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IN THE

Supreme Court of the United States

No. 1047.

THE DETROIT UNITED RAILWAY, *Appellant*,

vs.

THE CITY OF DETROIT, *Appellee*.

MOTION TO DISMISS, AFFIRM OR ADVANCE.

The appellee, the City of Detroit, comes and moves:

First: To dismiss the writ of error and appeal in this cause for the reason that no Federal question is involved in the case, which would authorize or justify an appeal to this court from the Supreme Court of Michigan.

Second: In case the foregoing motion be denied, said appellee moves to affirm the judgment of the Supreme Court of Michigan for the reasons that it is manifest that the appeal is taken for delay only, and the questions involved are so frivolous as not to need further argument.

Third: In case both the foregoing motions should be de-

nied, appellee moves to advance the cause, and set the same for hearing at the earliest date which suits the convenience of the court, for the reasons stated in the affidavit of Richard I. Lawson attached hereto, and because in the ordinary course, the cause cannot be heard for two years, and great public interests and large sums of money are involved and because the bond filed affords no protection or indemnity to the appellee or its citizens whose interests are affected daily.

RICHARD I. LAWSON,
ALFRED LUCKING,
Counsel for the Appellee.

AFFIDAVIT OF

RICHARD I. LAWSON, Corporation Counsel of Detroit, in support of motions second and third above:

IN THE SUPREME COURT OF THE UNITED STATES.

No. 1047.

DETROIT UNITED RAILWAY, *Appellant*,
vs.
THE CITY OF DETROIT, *Appellee*.

UNITED STATES OF AMERICA,
District of Columbia, *ss.:*

Richard I. Lawson, being duly sworn, deposes and says:

That he is Corporation Counsel of the city of Detroit, appellee herein, and has been connected with the legal department of said city for upwards of five years last past;

That the parties to this suit have been for years at legal war with each other over rights in and about the streets of said city, as appears from the records and decisions of this court, as well as the records and decisions of the courts of the State of Michigan.

That the decision of the Supreme Court of Michigan from which the appeal in this cause was taken is the first adjudication that the railway company's rights in the streets terminated upon the dates fixed in the grants.

That there are about 190 miles of railway tracks in said city.

That on December 14, 1909, franchises on about 65 miles of the principal trunk lines expired, since which date the railway has been paying $300 per day to the city under a day to day resolution for the use of the streets, pending a final determination of the differences between it and the city, the railway all the time claiming, however, that the rights under said franchises had not expired, and such payments were made without prejudice to its rights.

That in June and July, 1910, the franchises upon Fort Street division covering about 16 miles, expired according to the city's claims, and the city demanded that if the railway continued to occupy the streets, it should pay $200 per day in addition to the $300 above mentioned.

That upon the railway's refusal to comply with the demand of the city, this suit was brought.

That depending on an early disposition of this case are the rights of the city to get needed railway extensions, lower fares, and a settlement of the entire street railway question.

That defendant is collecting five-cent fares upon the main trunk lines where the city claims all its franchise rights have expired, which claim is disputed by the railway company.

That this covers about 80 miles in all, including the Fort Street division and those other lines on which the said nominal charge or rent of $300 per day is being paid, simply as a

temporary measure while the ultimate rights of the parties are being determined.

That under a franchise granted at a much later date than the others and running until 1924, the said railway company is operating about 60 miles of railway on the back or less important streets, under which franchises the fare is 8 tickets for 25 cents during nearly all the day-time and six tickets for a quarter at night.

That the difference between these rates of fare and those on the said principal streets where the city claims the franchises have expired (which claim is disputed by the defendant) amounts to many hundreds of thousands of dollars per annum to the people of Detroit.

That settlement of the above disputes is depending upon the present case and its early disposition is of the most vital importance.

That the bond given in this case affords no protection whatever to the city or its people and every day's delay means many thousands of dollars which said railway company is collecting from said people without any shadow of right whatever, as claimed by the city, solely because the hands of the city are tied by this litigation.

Deponent further says that said city has grown considerably over 100 per cent in the last 14 years in population without any substantial increase in the mileage of street railways.

That great extensions are imperatively needed, running many miles, and the growth and prosperity of the city are stunted and prevented and many thousands of its citizens daily incommoded for the want of such extensions.

Deponent further says that nothing can be definitely or properly decided or settled until the rights of the railway and the city are set at rest by the final decision in this cause.

And further deponent says not.

RICHARD I. LAWSON.

Subscribed and sworn to before me this tenth day of April, 1913.

JOHN E. BENTON,
Notary Public, D. C.

(Seal.)

A BRIEF STATEMENT OF THE FACTS.

This suit in equity was brought by the City of Detroit as complainant in the Circuit Court for the County of Wayne, In Chancery, to determine that the franchises of the Detroit United Railway, defendant-appellant, to operate its cars on Fort Street division, Detroit, Mich., had expired June 17, June 30, and July 24, 1910, respectively, and to compel defendant to pay a temporary rental of $200 per day, fixed by resolution of the Common Council, or otherwise to compel it to vacate the street.

The decree for complainant below was affirmed by the Supreme Court of Michigan in all substantial parts—and thereupon the defendant obtained a writ of error removing the cause to this court from the Supreme Court of Michigan, which appeal we now ask be dismissed, because no Federal question is involved.

Defendant operated its Fort Street Division under three separate franchises, which, by their express terms, expired June 17, June 30, and July 24, 1910, respectively, copies of which franchises are printed as Exhibits X, Y, and W, Vol. I of the Record below, pp. 19- 22.

Shortly prior to these respective dates of expiration, the Common Council passed resolutions, Exhibits S, T, and Q, Vol. 2, p. 27-32, reciting such proximate expirations and

fixing the terms on which the railway might temporarily continue to occupy, such terms being the payment of $200 per day, and otherwise the same terms as before. The railway Company expressly refused to accept the terms and declared its intention to continue to occupy, which intention it carried out.

These three resolutions were much alike in substance, but the last one embraced and superseded the two former, and its terms, in substance, were as follows (See Ex. Q, Record below, Vol. I, p. 31):

It recited the passage of the two former resolutions of June 14 and 21, respectively, and recited that the franchises on the three sections of the Fort Street Division expired by limitation on those dates, respectively; recited that certain litigation already existed, concerning the rights of the railway upon all streets in Detroit where franchises had expired; recited that under the Constitution of Michigan no term franchise or agreement could be made unless affirmed by a three-fifths vote of the electors, and that no street railway company could operate in the streets without the consent of the duly constituted authorities of the city; and then resolved:

> "That upon the following terms and conditions, and upon no other, consent, permission and authority is hereby granted to the Detroit United Railway to continue from day to day, after July 24, 1910, to operate its cars upon the streets,"

described in the several preambles, and then, fixing the terms of $200 per day, and concluded as follows:

> "And except upon the foregoing terms and conditions, consent, permission and authority are hereby refused and denied, and this resolution is subject to revocation at any time at the will of this council."

The defendant appellant railway thereupon replied to the notice of the resolution, by written communication to the Council, and among other things, said:

> "We are compelled to advise you that we deny the statement contained in the preamble of said resolution to the effect that the rights of the company have expired on the streets mentioned. We are also advised that the requirements to pay such sums of money are illegal for other reasons. We are therefore compelled to inform you that we decline to pay said sum of $200 per day in addition to the sum we are now paying." (See Record below, Vol. I, p. 33.)

Following this communication, the city started this suit to determine defendant's rights, and to compel it to pay the rental fixed in the resolution, or to vacate the streets.

The defendant, in its answer and cross-bill, claimed that its rights to continue to operate had been extended to 1921 by implication under a proper construction of an ordinance of the Common Council (known as Ex. H, Record below, Vol., one, p. 67), passed in 1906, which purported to amend certain ordinances granted by the township of Springwells, while a portion of the territory now within the city was a part of said township, and which ordinance of 1906, required defendant to accept workingmen's tickets until 1921. Defendant also claimed, in its answer, that the original ordinances were, by implication, perpetual until modified by mutual agreement, because the original ordinances were silent as to what should be done at the expiration of the express limited term for which they were to run.

The Circuit Court in chancery determined that all defendant's rights had expired; that it had not accepted, either in fact or by operation of law, the terms of the resolutions, Exs. S, T, and Q, above referred to, and that it must decide

to do so in ten days for future operation, or it must vacate the street; and the decree accordingly was entered.

On appeal, the Supreme Court of Michigan held that all defendant's rights had expired; that it had not accepted the $200-per-day resolution; and that it must vacate within a specified time after being notified by the Common Council to do so. Thereupon, defendant obtained the writ of error from this court.

THE FEDERAL QUESTIONS.

The defendant appellant claims two Federal questions are involved, authorizing the appeal, and only two. They are as follows:

> (1) "In deciding that petitioner, in operating cars in the streets, was a trespasser, and in ordering it to cease said operations, and to remove its property, the Supreme Court of Michigan *decided an issue not legitimately presented to it by the pleadings*, and therefore deprived petitioner of its property without due process of law."
>
> (2) "The Supreme Court of Michigan erred in *giving to the resolutions* (S, T, and Q) *of the Common Council the effect of impairing the obligations of contracts* of your petitioner, contrary to Section 10, Article I, of the United States Constitution, and in depriving it of its property without due process of law, contrary to the Fourteenth Amendment."

On the other hand, we claim:

(1) That manifestly no Federal question is involved;

(2) That the appeal is taken on frivolous grounds, and for delay;

(3) That the public interests in the speedy determination of the cause, and the great and irreparable injustice and injury of delay, are such as to require a prompt and summary disposition of the case.

I.

ARGUMENT ON THE MOTION TO DISMISS.

With confidence, we affirm that no Federal question is involved in the cause, and that none is pointed out by the defendant appellant in its petition.

A. *The Petition* for the writ of error claims as the first Federal question that:

> "In deciding that petitioner, in operating cars in the streets was a trespasser, and in ordering it to cease said operation and to remove its property, *the Supreme Court of the State decided an issue not legitimately presented to it by the pleadings*, therefore deprived petitioner of its property without due process."

We affirm that the issues, as pleaded, as joined, as tried, and as decided, did positively and clearly include the right of defendant to further occupy the street, and the right of appellee to have it removed by order of the court.

The opening statement of the issues made by appellant's counsel, in their brief in the Supreme Court of Michigan, completely overthrows their claim now made. We quote from page 1 of that brief, as follows:

> *"This bill was filed by the City to obtain* an adjudication that the defendant's rights in the greater portion of its Fort Street line had expired; and also that since such expiry, the railroad company had become obligated to pay

> the city a rental of $200 per day for operation under permission of the city temporarily given therefor of the portion so expired, *and to compel a cessation of and the removal of its tracks and equipment from the expired portion of the line.* The main questions presented are whether the company's rights in this line have expired; whether the company in any way became obligated to pay the rental claimed by the city, and whether, if such obligation does not exist, the continued operation of the line in question has become unlawful so as to require the discontinuance of this transportation service and the company's ejection from these streets."

Thus it will be seen that *no claim was made,* or can be made, *but what the pleadings included properly* all the issues involved in the decree for the removal of the defendant, but it is said the Corporation Counsel of Detroit had not been expressly instructed by the Common Council to ask for such removal, and the Common Council had not explicitly ordered the removal.

This point was made at the very outset of the hearing in the Circuit Court, the counsel for the defendant appellant alleging that the Corporation Counsel of Detroit had exceeded his authority in framing the bill so as to put defendant off the streets. We quote the opening statement of counsel for defendant in the Circuit Court, which was made before any proofs were taken (Vol. II of record, pp. 5-6):

> "We further allege that the City of Detroit has never demanded possession of the streets or served upon us any notice to get off the streets, and has never instructed the Corporation Counsel to take any proceedings to put us off the streets."

Thereupon, to settle all controversy respecting it, the Common Council of Detroit passed a resolution (see record below, Vol. II, p. 86), reciting that the authority of the Corporation

Counsel to bring the suit, collect the rental or remove the defendant, was questioned, and resolving that the Common Council, being fully advised, "approved of, and ratified, fully and completely, the action of the Corporation Counsel in bringing this suit, and every prayer for relief placed by him in the bill of complaint." This resolution was passed unanimously and was introduced in evidence in the Circuit Court on June 17, 1911. (Record below, Vol. II, p. 86.)

Afterwards, the case was argued, and on July 8, 1911, the Circuit Court filed its opinion, which is printed in Vol. II of the record below, at pages 100 to 122. At the conclusion of the opinion, the Court said:

> "The City has made out its right to a decree that the company is without any franchise entitling operation or maintenance in the affected streets. In view of the rejection of the terms proffered by the City, the complainant's right to an injunction restraining such operation is established. Further, the right of the City to have the defendant's physical equipment seasonably removed from the streets, having been shown, such relief is available to the complainant. * * *
>
> "While clear that the City has the undoubted right to the relief defined, it is within the power of the prevailing party to say when that relief shall be granted. * * * The entry of the decree is therefore withheld until the complainant shall have further indicated its position upon these phases of its rights."

Thereupon, before the decree was entered, the Common Council passed another resolution, instructing the Corporation Counsel to enter a decree pursuant to the opinion, and to obtain, if possible, a decree for all the back rentals. (Record below, Vol. II, p. 93.)

It will thus be seen, in the first place, that the issues were all presented by the pleadings; that they were fully litigated

and decided. It will also be seen that the Corporation Counsel had full authority from his client to present those issues. What room, therefore, exists for the contention of the defendant appellant that the issues were not legitimately within the pleadings, is beyond our comprehension.

Simmered down, the point of defendant seems to be that although its rights had expired, and although the Council had duly notified it by resolution that it could continue to use the streets only upon certain conditions, and that otherwise all consent and permission to occupy the streets was refused and denied, and although the defendant repudiated those terms and defied the City, and made false claims to continuous rights in the streets, and although a suit in equity was brought and litigated, in which all the questions in issue were raised, discussed and decided, yet it is not due process of law, because the City had not previously ordered it, *in so many words and without any conditions* to cease operations and remove from the streets. Could anything be more absurd: that the wrongdoer and trespasser is robbed of vague, floating and indefinable Constitutional rights because the person upon whose property he is trespassing does not serve him with every conceivable notice in advance of starting suit?

The City had affirmed that the defendant's rights had expired; the railway had denied this, and insisted upon remaining. Now, they say that before the City could bring a suit to test those questions, it must formally, by resolutions order the defendant off the streets; that defendant has a vested right to have a resolution passed ordering it off, and if not done it is deprived of its property without due process, although all the questions as to whether it had any such property were duly raised, heard, and determined.

We submit the pleadings covered all the issues. They were fully litigated. They were decided by the highest courts

of the State in pursuance of a suit duly and properly planted, and that due process of law does not require more than this.

McGehee on Due Process of Law, pp. 35-42.
Holden vs. Harder, 169 U. S., 366.
Caldwell vs. Texas, 137 U. S., 692.
Walter vs. Sauvinet, 92 U. S., 90-92.
Davidson vs. New Orleans, 96 U. S., 97-104.
Mo. Pac. vs. Humes, 115 U. S., 512.
Fallbrook vs. Bradley, 164 U. S., 112.
French vs. Asphalt Co., 181 U. S., 324.

B. SECOND. *It is claimed by the appellant's counsel that its contract rights were impaired, contrary to the Constitutional provision on that subject.*

The precise point made here is that defendant had certain contract rights to remain longer in Fort Street, and that the Michigan Supreme Court decision gave to the resolutions, Exs. S, T and Q, of the Common Council the effect of cutting off or impairing those contract rights.

We answer:

(1) No such effect was given these resolutions, and no effect at all was given the resolutions by the Supreme Court of Michigan;

(2) Defendant had manifestly no contract rights to be impaired.

(1) There is not a line, or a word, or a syllable in the opinion or the decree of the Michigan Supreme Court which tends to give to the resolutions the effect of cutting off any contract rights of appellant.

On the contrary, the resolutions were held to be without any effect whatever, because the defendant did not accept them.

Here are the unvarnished facts in a few words, which ought to dispose of this flimsy claim:

Defendant's franchise rights were about to expire, June and July, 1910, and thereupon the Common Council passed the resolutions in question, Ex. S. T. Q., reciting the fact of the proximate expirations and giving permission to the railway to remain temporarily upon the same terms as before, if it would pay $200 a day, and otherwise declaring that its consent and permission were denied and refused. The defendant denied that its rights had expired at those dates, and refused to accept the resolutions, and continued in possession.

The Court held: First, that the rights did expire by limitation on those dates; second, that those rights had not been extended by the ordinance of 1906; and, third, that as the company had not accepted the terms of the resolutions, the City could not collect the $200 per day, but that its only remedy was to put defendant off the street.

It did not hold that the resolutions had any effect whatever.

To prove this, we quote from the opinion of the Michigan Supreme Court (see the same printed at length in appendix hereto, pp. 26-48) as follows:

> "By the terms of the ordinances creating these franchises they terminated by limitation June 17, June 30, and July 24, 1910, respectively. The rights of defendant created by these grants, unless as is claimed there was some extension given, expired contemporaneously with

the franchises. These franchises, granted by the complainant municipality to the defendant company, and accepted by it, constitute in law contracts mutually binding on both parties. By their terms, as already stated, they expired by limitation. This and other courts have repeatedly held to this effect. (Citing cases.)" (See Post, pp. 38-39.)

Speaking of the claim that these franchise rights had been extended to 1921 by the ordinance of 1906, the Court said:

"We think that it is not necessary to give this ordinance a construction by inference and presumption, but hold that by its plain and unambiguous terms it was restricted to a modification of the township grants as to rate of fare, and any and all other changes or modifications of the terms of said township grants to this railway were expressly excluded. (Post, p. 42.) * * *

"We hold therefore that these franchises were not extended by the ordinance of 1906, but expired by their terms on the respective dates hereinabove given, at which time the contractual relations between these parties ended, and all rights in the defendant company to occupy the city streets, and maintain and operate a street railway thereon, terminated." (Post, p. 43.)

The court then took up the effect of the resolutions, Exhibits Q, *et al.*, fixing the $200-per-day rental for future temporary occupation, and held that they were without effect because not accepted.

Among other things the Court said:

"The defendant never acquiesced in nor accepted the terms imposed in case of the use of these streets by defendant after the expiration of the franchises. On the contrary, by written notice, the city was notified of defendant's claim, that the franchises had not expired and * * * that it would not accept the same * * * while the cases cited to the effect that a municipality on

the expiration of a franchise for a street railway, may impose such terms as it sees fit for the further use, are accepted authority, none of them determined that they become operative without acceptance by the railway." Post, pp. 44-45.)

It is thus apparent and indisputable that the court simply construed the grants of the defendant, and held that they had expired by limitation, and had not been extended by the ordinance of 1906, but it did not hold that the resolutions, Ex. Q. S. T., had taken away any rights whatever.

The claim of the appellant is that these resolutions were given such effect by the decision as to cut off appellant's contract rights; whereas, in fact, the court held that appellant did not have any such contract rights.

THE LAW.

THE LAW is settled in this court by numerous decisions directly applicable to this state of facts, and we beg to cite a few, as follows:

The impairment of a contract, to support writ of error

(1) Must be by a law of the state.
St. Paul M. & M. Ry. vs. Todd Co., 142 U. S., 282-7.
Knox vs. Exch. Bank, 12 Wall., 379-383.

But a municipal ordinance may have that effect.

St. Paul Gas Light Co. vs. St. Paul, 181 U. S., 142.
Walla Walla vs. W. W. W. Co., 172 U. S., 8-9.

(2) Requires that there be a legal contract and ground to believe it impaired.
New Orleans vs. N. O. Waterworks Co., 142 U. S., 79.

(3) The construction and interpretation of a contract do not constitute an impairment of its obligation within the meaning of the constitution. In order to effect an impairment there must be some subsequent statute or law impairing the obligation thereof.
Central Land Co. vs. Laidley, 159 U. S., 103-110.

"The prohibition (impairment of contracts) is aimed at the legislative power of the State, and not at the decisions of its courts, or the acts of administrative boards or officers."
N. O. W. Co. vs. LaSugar Co., 125 U. S. 18-30.

The construction and interpretation of a contract are not subject to review. This is so even though the state court is manifestly in error.

R. R. Co. vs. McClure, 10 Wall., 511-515.
Yazoo & Miss. R. R. vs. Adams, 180 U. S., 41-46.
McCullough vs Vir., 172 U. S., 127.
Loeb vs. Columbia, 179 U. S., 193.
Mo. Ry. vs. Olathe, 222 U. S., 187.

In Missouri Interurban Ry. vs. Olathe, 222 U. S., 187, the plaintiff below, a city in Kansas, granted to the Interurban Co. the privilege of using certain streets for which right the company was to pay the city an agreed sum on completion of the road. The city by subsequent ordinance prevented the use of a contemplated turn out. On suit by the city for the stipulated compensation the state courts decided the company had received substantially everything and that compensation was due. On motion to dismiss the U. S. Supreme Court held that "the decision did not give effect to the subsequent resolution,

which it was asserted impaired the obligation of the contract but was placed distinctly upon the ground that—the money was payable, as the road had been substantially completed."

This case is in point in that the subsequent resolution did not affect the judgments rendered.

Mandamus to direct levy of special tax to pay claims vs. New Orleans School Board based on certain contracts made by the board with teachers and others under an Act of 1873. Petitioners claimed contracts were authorized and payable out of a special tax, unlimited in amount, and that Art. 232 of Louisiana constitution of 1898 was void as it limited taxation and therefore impaired the obligation of the contracts. Court (Holmes, J.) said:

> "The plaintiffs in error are met at the outset by a denial of the jurisdiction of this Court. The main grounds upon which the Supreme Court of the State decided the case were that the relators had been guilty of laches and that the act of 1873 did not authorize contracts to be made by the School Board in such wise as to bind the city to levy the tax. The court did not purport to rely upon the constitution of 1898, or any subsequent legislation, for the result. It did not purport to enforce any later law; it simply denied the existence of the right alleged. Therefore on the face of the decision there is no warrant for coming here. But it is said that this court is not limited to the mere language of the opinion but will consider the substance and effect of the judgment; * * * Both of these statements are true, of course and are relevant when the judgment really gives effect to a later act of the State that would impair the obligation of the contract if the contract were as alleged. But the mere allegation of a later constitution or statute impairing the obligation of the contract gives no jurisdiction to this Court to see that the contract is enforced according to its tenor, irrespective of the supposed interference of the later law. The jurisdiction extends to doing away with such an interference, but not to remedying

an erroneous construction of contracts or to seeing that they are carried out according to the interpretation of this Court, apart from it."

Write of error dismissed.

Fisher v. New Orleans, 218 U. S., 438, 1910.

Same effect:

Lehigh Co. vs. Easton, 121 U. S., 388, 392.

Quo warranto by attorney general of Louisiana to forfeit charter of defendant waterworks company for misuser of franchises. State legislature adopted a resolution referring the matter to the attorney general for such action as he might deem proper. State Supreme Court forfeited defendant's charter. Defendant claimed (1) taking property without due process of law, (2) denial of equal protection of laws (3), impairment of obligation of contract. States moves to dismiss writ of error.

Peckham, J., said:

"This court does not and cannot entertain jurisdiction to review the judgment of a State court, solely because that judgment impairs of fails to give effect a prior contract without always impairing its obligation. The judgment must give effect to some subsequent state statute, or state constitution, or, it may be added, some ordinance of a municipal corporation passed by the authority of the state legislature, which impairs the obligation of a contract, before the constitutional provision regarding the impairment of such contract comes into play." * * *

"When analyzed, the whole claim is reduced to the assertion that in enforcing a condition which is impliedly a part of the charter, the State, through the regular administration of the law by its courts of justice, has by such courts, erroneously construed its own laws. This court in such a case has no jurisdiction to review that determination.

"The assumption that the state court has refused to apply to the contract herein set up the general provisions of the law of contracts prevailing in the State, and that, therefore, the State has taken through her judiciary the property of the plaintiff in error without due process of law, is wholly without foundation. If it was otherwise, then any alleged error in the decision by a state court, in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him. This cannot be maintained.

"That the bondholders were not made parties is also a question which this court cannot review * * * the corporation, by the very terms of its existence, is subject to a dissolution at the suit of the State on account of any wilful violation of its charter, and the creditors of the corporation deal with it subject to this power. They must accept the result of the decision of the State court."

Writ of error is dismissed.

New Orleans Waterworks Co. vs. La., 185 U. S., 336, 1902.

Peckham, J.:

"If the judgment of the State court gives no effect to the subsequent law of the State, and the State court decides the case upon grounds independent of that law, a case is not made for review by this Court upon any ground of the impairment of a contract."

Bacon vs. Texas, 163 U. S., 207, 216, 1895.

See especially:

St. Paul Gas Co. vs. St. Paul, 181 U. S., 142.

Also see:

N. O. W. vs. La. Sugar Co., 125 U. S., 30.

Hopkins vs. McLure, 133 U. S., 380.

C. *We submit that defendant had no contract rights to be impaired, and that this is manifest on the face of the showing.*

In its petition appellant claims three such contracts, as follows:

We quote from the petition (substance only):

> "The contracts, the obligations of which petitioner claims to be impaired, are three:
>
> "(a) A contract contained in the ordinance, Exhibit H, enacted May 2, 1906. (This is the ordinance claimed to have extended the franchises to 1921)."
>
> "(b) Another contract, the obligation of which is impaired, is contained in agreements in the ordinances Exhibits E and F, Record below, Vol. I, pp. 58 to 62.
>
> "(c) The other contract, the obligation of which is impaired is an implied contract, viz., that the railway and other property of your petitioner should, instead of being removed upon the termination of the period for which the right of operation is granted, the contract under which it was constructed being silent upon the subject, continue in place and in use for the purpose to which it is devoted on terms that are reasonable and in conformity with the rights of the city, the public, and petitioner."

(a) *As to the first alleged contract:*

Herein it is claimed that the ordinance of 1906, Exhibit H, operated to extend the ordinances in question which by their terms expired June and July, 1910, although it nowhere referred to them or to the subject of extensions, but only to rates of fare during working men's hours, on other portions of the line. This question was properly pleaded, was argued, and decided in both courts. It is not necessary to argue this question at length. The ordinance in question by its express terms was limited to amendments to the township grants, which had

nothing to do with the portions of Fort Street in question in this cause.

We refer the court to the opinion of the Supreme Court of Michigan on this question, printed at length herein on pp. 26-48, post. That opinion states the facts clearly, quotes the important portions of the ordinances, and disposes of the question in such a clear, concise and convincing manner as to make further discussion quite unnecessary.

The precise point raised by the defendant appellant on that subject is covered by the decision of this court in *Cleveland v. Railway,* 204 U. S., 116, 139-140 and 141. Also to the same effect are the following:

137 Fed., 111, and 169 Fed., 308.

The decision of the Supreme Court of Michigan is so manifestly and palpably the only one that could be made on this ordinance that any appeal based on this claim must be regarded as frivolous.

(b) *As to the second claim of a contract right arising under the ordinances, Exhibits E and F:* Rec., Vol. 1, pp. 58-62.

This is an absolutely new claim. It was not made in either the Circuit Court or the Supreme Court of Michigan. This is the first we have heard of it.

We submit an entirely new and unheard of claim of a contract right cannot form the basis of an appeal to this Court from the decision of the Supreme Court of the State, whose attention was never called to any such alleged right.

The claim is that ordinances of the township of Springwells

(lying just outside the city of Detroit), giving to the defendant's predecessor the right to build a street railway and connect with one in the city of Detroit, using some general language to the effect that that company should connect with its line in the city and charge five cents on the whole line in and outside the city, operated when the territory became annexed to the city to extend the life of the franchises on the other lines inside of the city.

That is, the counsel contend that franchises which when passed by the township boards did not and could not affect the lines within the city; and notwithstanding that for years thereafter they had no effect upon the lines within the city, yet when the territory afterwards became a portion of the city, those ordinances operated to extend franchises on other lines within the city of Detroit with which those lines connected.

This contention, with all due respect, seems to us too absurd to deserve discussion, and we decline to dignify such a claim by discussion, especially in view of the fact that we never heard of such a claim being made in this case before.

(c) *As to the third claim of a contract:*

Herein the railway claims that when a franchise is granted to a company to construct and operate a street railway for a definite and limited term, and the contract is silent as to what shall be done with the tracks at the end of the period, there is an implied contract that the rails and other property should, instead of being removed, continue in place and in use for the purpose to which it is devoted on terms that are reasonable.

This novel and startling proposition is answered to the sat-

isfaction of all reasonable persons by the opinion of the Supreme Court of Michigan as printed hereinafter, on pp. 26-48, and by the authorities there cited. It is not necessary to further answer the same. It must also be regarded, with all due respect, as a frivolous claim.

No authorities could be found to sustain such proposition, and many authorities, including authorities in this Court, repudiate it.

II.

ARGUMENT IN SUPPORT OF THE MOTION TO AFFIRM.

If the Court should be of opinion that a Federal question is involved and should deny the motion to dismiss, then we ask an affirmance of the decree below, because the appeal is manifestly for delay and the questions on which the decision of the cause depend are so frivolous as to need no further argument.

In support of this motion we beg leave to refer the Court to the argument in support of the motion to dismiss, ante, pp. 9-24.

We also refer to the opinion of the Supreme Court of Michigan printed in the appendix hereto, pp. 26-48.

These, in our humble opinion, demonstrate the frivolousness of the appeal, and that delay can be the only object. The affidavit of the Corporation Counsel, printed, ante, pp. 2-5.

shows the great gain to the appellant by every day of delay. Three years ago its franchises expired on 80 miles of our streets, nearly all the great trunk lines—and it continues to collect these immense surpluses year after year in utter defiance of the city, by reason of these delays. Meanwhile the city suffers for needed extensions and in the loss of immense sums as shown in the affidavit of Mr. Lawson.

III.

ARGUMENT IN SUPPORT OF MOTION TO ADVANCE.

If the Court should deny both of the preceding motions, we ask most urgently in behalf of the city that an early day, at the convenience of the Court, be fixed for the hearing.

The affidavit of Mr. Lawson, ante, pp. 2-5, gives but a faint impression of the intense public interest in this case and the large public interests at stake.

If we are right and the courts of Michigan are right, the defendant is a trespasser upon 80 miles of the streets of Detroit and is gathering many hundreds of thousands of unearned dollars from our people every year, without any final redress to the people being possible.

The bond given affords absolutely no protection and in the nature of things cannot do so. The city suffers every day for needed extensions.

No mileage of any consequence has been added in 14 years and the city has more than doubled in population.

Thousands of our citizens are incommoded every day for want of added facilities, and nothing can be done until these conflicting claims and rights are settled.

We humbly pray this Court for an early date of hearing.

RICHARD I. LAWSON,
ALFRED LUCKING,
Counsel for the Appellee, The City of Detroit.

APPENDIX.

OPINION OF THE SUPREME COURT OF MICHIGAN

STATE OF MICHIGAN.

SUPREME COURT.

CITY OF DETROIT, *Complainant,*
vs.
DETROIT UNITED RAILWAY, *Defendant.*

BEFORE FULL BENCH, EXCEPT BLAIR, *J.*

Filed October 1, 1912.

McALVAY, *J.*

This litigation has arisen from disagreements between the parties relative to the respective rights of each, arising from their relations to each other under certain street railway grants made to defendant and its predecessors in title to occupy certain streets, all now included within the limits of said city, for the purpose of constructing and operating thereon a street railway.

Before the statement of the material facts in this case is made a brief outline of the pleadings will be helpful to an intelligent understanding of the relation of such facts to the question involved.

The complainant, claiming to be entitled to relief in a court of equity, sets forth in its bill of complaint that the franchises and rights of defendant in that portion of its railway system in the city of Detroit called the Fort Street Division had expired, and, in view of that fact, before such expiration, certain resolutions were adopted by the city authorities, declaring that such franchises would expire on dates named, and that defendant could continue to operate on said street only

upon certain terms and conditions specified, including the payment of $200 per day to the complainant for the use of said streets. The bill shows that defendant denied such expiration of its franchises and denied the right of complainant to impose such terms, and continued to occupy and use the streets with all its equipment thereon located and to operate its street railway thereon in defiance of the demand of complainant. The bill of complaint prays that the rights of the railway company in the streets be decreed to have expired on the dates specified in the resolutions; that by operating after the expiration of its franchises it be decreed to have accepted the terms of the resolutions and be compelled to pay the charges fixed therein; that an accounting be had to ascertain the amount due and owing; that defendant be perpetually enjoined, unless, conforming with the terms of such resolutions by payment of the full amount arising thereunder, from running and operating its street cars upon said streets and be required to remove its railway equipment therefrom. There was also a prayer for general relief.

Defendant's answer denies that its franchises had expired, as alleged in said bill; insists that it still has the right to continue to operate upon said streets, notwithstanding the resolution and notices thereof from complainant. It admits its refusal to pay $200 per day for the use thereof and declares its intention to continue to occupy and use the streets in defiance of complainant's claims and the action of the municipal authorities. Defendant charges that the sum of $200 per day is excessive as compared with the $300 per day previously fixed by the city for other lines where franchises had expired, and that the charge in proportion for the Fort Street Division should not exceed $40 per day, and denies the jurisdiction of a court of equity to grant relief. The cross-bill portion of the answer sets up that by agreement with the city, May 2, 1906, being an ordinance of that date, complainant, in effect, extended the company's rights on the Fort Street Division until December

14, 1921; also that the sum of $200 per day, fixed by complainant for the use of the streets, exceeds the net earnings of the Fort Street line, and is unreasonable and confiscatory; that the resolutions mentioned constitute a cloud on defendant's title, and are in violation of the constitution of the United States; that to grant complainant's claims and to discontinue such street railway service would greatly injure the people of the city of Detroit; that, notwithstanding the time limit placed upon the franchises granted to the defendant, it was the contemplation of the parties that defendant should continue to operate until the agreements were changed by the mutual consent of both parties and that, notwithstanding the grants from the city defendant has the right to operate its railway and charge toll therefor to its passengers; that defendant under its franchises was subjected to a public duty and obliged to continue its performance in perpetuity. The answer prays that complainant be restrained from collecting the $200 per day mentioned, and enjoined from interfering with the right of defendant to operate on the Fort Street Division and for general relief.

Three certain grants or franchises to operate a street railway and the only ones involved, were given to those through whom defendant has acquired title, part of them within the city of Detroit, and part of the time of the grants beyond the limits of the city. By the addition of contiguous territory to the city of Detroit before this litigation was instituted, all of the streets upon which these franchises were granted were included within the limits of the city, and are now part of the Fort Street Division of defendant railway. The first grant referred to was under date of January 31, 1865, and extended from the then boundary of the city at 24th street easterly upon Fort street and then through intermediate streets to the then eastern city limits. It was for a period of 30 years, and was extended for a period of 30 years from June 30, 1880, expiring June 30, 1910. Another grant was given by the township

of Springwells June 17, 1880, which connected with the terminus of the first grant at the intersection of Fort and 24th streets, thence south on Clark street to Jefferson avenue, thence west on Jefferson avenue to Artillery avenue. It was for the period of 30 years, expiring June 17, 1910. This was the franchise taken into the city in the territory annexed June 20, 1885. After this annexation to the city the common council by ordinance on July 24, 1886, granted the right to operate a street railway along Fort street from the western terminus of the first grant to the newly established city boundary, which was at the line of Artillery avenue. The life of the ordinance was fixed "for the term of twenty-four years from the date of the passage of this ordinance," and therefore terminated on July 24, 1910. The order of dates of the expiration of these grants, by limitation, would occur June 17, June 30 and July 24, 1910, respectively. Another ordinance, and the one which is claimed by defendant to extend the three foregoing grants on the Fort Street Division to December 24, 1921, was passed by the common council of complainant May 2, 1906, and is entitled "An Ordinance in relation to rates of fare on Fort street railway lines of the Detroit United Railway." Its terms and provisions will be stated when its claimed relation to the expiration of these franchises is considered.

On September 26, 1905, an ordinance was introduced in the said common council, which was amended and finally passed March 3, 1908. It is entitled "'An Ordinance providing for the operation of cars on or in any street on which the franchise right has expired." This ordinance, by its terms, as indicated in its title, imposed on those portions of defendant's system where the grants were about to expire regulations and requirements as to rates of fare and transfers, fixing three cent fares if purchased in strips of five tickets, with universal transfers; also as to maintaining pavement between the tracks and for a distance outside of same; it also required defendant to change its routes on request, and remove tracks and over-

head equipment. It gave greater control to the council as to the kind and number of cars to be used and the kind of service, and required a change of grade when directed. It also contained a general provision making defendant subject at all times to regulations which, from time to time, might be deemed necessary by complainant's council, and general provisions also as to violations of these provisions and punishment therefor, thereby changing in material respects the requirements then imposed upon the defendant company under its franchises. This is known i nthe record as the Hally Ordinance. It is claimed by defendant "that the purpose of said ordinance was to compel this defendant to continue the operation of its cars at reduced rates of fare, and under other terms and conditions stated in said ordinance." Before this ordinance was published the Guarantee Trust Company of New York, as trustee for certain bondholders under a mortgage on the property of the defendant company, filed a bill in the Federal Circuit Court for the Eastern District of Michigan and obtained a restraining order against complainant taking steps to enforce said ordinance and from publishing the same or doing any action in relation thereto. In this suit defendant filed an answer and cross-bill, which complainant answered. It is now at issue and pending in the said court.

Some time prior to the dates of the expiration of the three franchises mentioned and described, under which defendant obtained its right to operate its street railway on the Fort Street Division, the common council of complainant passed three certain resolutions in relation thereto. The first was passed June 14, 1910, and related to the franchise expiring June 17, 1910. The second was passed June 21, 1910, and related to the franchise expiring June 30, 1910. The third was passed July 19, 1910, and related to the two franchises just referred to, and also to the third franchise expiring July 24, 1910. These resolutions are identical as to the material matters contained in them, except that the third refers to the action of the common

council taking in the first and second and fixes the per diem charge at $200, to cover the entire Fort Street Division involved in this litigation. It will be necessary, therefore, only to set out the third resolution, which is as follows:

July 19, 1910.

By Ald. ELLIS:

Whereas, the common council of the city of Detroit, at a session on June 14, 1910, declared by resolution that the franchise right of the Detroit United Railway as the successor in title to operate street cars on Fort street west from the west line of the Porter Farm to Clark avenue; thence south on Clark avenue to River street (Jefferson avenue west); thence westerly on the last named highway to a point opposite Fort Wayne, would expire on June 17, 1910; and

"Whereas, said common council, at a session held on the 21st day of June, 1910, declared by resolution that the franchise right of the Detroit United Railway as the successor in title to operate street cars on the whole of the system formerly known as the Fort Wayne & Belle Isle Railway Company's line, which is east of the west line of the Porter Farm, the particulars of which are more fully set out in said resolution and in the ordinances of the city of Detroit, would expire on June 30, 1910; and

"Whereas, said resolutions expressed the truth, and said franchise rights respectively did, on June 17, 1910, and June 30, 1910, cease to exist; and

"Whereas, the Detroit United Railway Company erroneously assumed that by the passage of said resolutions the city of Detroit was making it an offer which it was free to decline and negotiate for other terms, did on July 5, 1910, and in a communication to the common council, did decline to accept the terms in said resolutions contained; and

"Whereas, there is now pending in the Circuit Court of the United States for the Eastern District of Michigan, Southern Division, a case entitled: Guaranty Trust Company of New York City *vs.* City of Detroit and others, which involved the validity of an ordinance passed by the common council of the City of Detroit and com-

monly called the Hally Ordinance, which ordinance, among other things, prescribed the terms and conditions under which a street railway might continue to operate cars when and where its franchise right to do so had expired; and

"Whereas, the court has issued a temporary injunction whereby the city of Detroit, its agents, servants and attorneys are strictly restrained and enjoined from publishing or attempting to publish that ordinance and are likewise enjoined from enforcing or attempting to enforce by any means whatsoever the said ordinance; and

"Whereas, said ordinance is without force or effect until published and it is the duty of the city of Detroit to obey the mandate of the court; and

"Whereas, the franchise right of the Detroit United Railway as the successor in title to operate a street railway on Fort street west, beginning at Clark avenue; thence westerly to Artillery avenue, will have expired on July 24, 1910, and the city of Detroit has granted no franchise right to operate cars on said streets or portions of streets after July 24, 1910; and

"Whereas, all of said streets and portions of streets would after July 24, 1910, be subject to the terms and conditions of the Hally Ordinance, if the same is a valid enactment and is accepted by the Detroit United Railway; and

"Whereas, no term franchise or agreement under the revised constitution can be valid or binding unless the franchise or agreement shall have first received the affirmative vote of three-fifths of the electors of the city; and

"Whereas, under the revised constitution every street railway company is denied the right to use the highways, streets, alleys or public places of any city without the consent of the duly constituted authorities of such city, and is denied the right to transact a local business in the city without first obtaining a franchise therefor from such city;

"Therefore, Be It Resolved, That upon the following terms and conditions and upon no other, consent, permission and authority is hereby granted to the Detroit United Railway to continue from day to day after July

24, 1910, to operate its cars upon the streets and portions of streets last above set forth in said resolutions of June 14 and June 21, 1910, under the same terms and conditions, except as to percentages on gross receipts, now prevailing in the city of Detroit, whether due to contract agreement or not, upon the payment by the Detroit United Railway Company to the city Treasurer of all sums and demands specified by the resolution of June 14 and June 21, 1910, and which have not been paid, up to and including the 24th day of July, 1910, and thereafter upon the payment weekly by the Detroit United Railway to the city Treasurer of the sum of $200 for each day that the streets and portions of streets set forth in said resolutions of June 14 and June 21, 1910, are used by said company in the operation of its railway or railways, and except upon the foregoing terms and conditions, consent, permission and authority are hereby refused and denied; and

Be It Further Resolved, That this resolution is subject to revocation at any time at the will of the common council or of the people of the city of Detroit."

Official notice of all of these resolutions, with copies thereof, were duly served upon defendant. To the first and second defendant replied as follows:

Detroit, June 30, 1910.

To the Honorable, the Common Council:

Gentlemen:

"We have received official notice of two resolutions adopted by your Honorable Body, one under date of June 14, 1910, requiring for the reasons stated therein, the Detroit United Railway to pay $50 per day additional to the city, and one under date of June 21, 1910, requiring the company for like reasons to make a further payment of $100 per day.

"We are compelled to advise you that we deny the statement contained in the preamble in each resolution to the effect that the rights of the company have expired on the streets mentioned in said resolution. We are also

advised that the requirement to pay said sums of money are illegal for other reasons. We are, therefore, compelled to advise you that we must decline to pay said sums.

"Perhaps it may not be inappropriate to say to you that the increase of the ad valorem tax which has been made this year, added to the excessive demands now being made, has prevented us from completing our arrangements for borrowing the money necessary to make all the extensions required by your recent resolutions which we accepted. These resolutions, with other necessary improvements and betterments which we have contemplated, call for the expenditure of nearly two million dollars, the addition of such burdens as you seek to impose upon us, and the threat to add still others puts it beyond our power to raise the money for the purposes above indicated.

"When your Honorable Body adopted the resolution regarding the payment of $300 per day, we then advised you that we did not regard the requirement as a legal one, but in the hope of avoiding litigation and further friction between us, and without waiving our legal rights, we have paid that sum, and for the present will continue to pay it, under the conditions named in our letter advising you that we would. This was with the belief that no further burdens would be added.

"We do not believe that you have fully considered the necessary effect of the imposition of these heavy burdens upon the company, and therefore respectfully call your attention to it.

"We believe we should again call your attention to the failure of the city to properly maintain the track and paving foundations and the paving on the lines known as the Detroit Railway System, and in this connection we beg to call your attention to our letter to His Honor, the Mayor, concerning the matter. This company is at all times ready to cooperate with your Honorable Body in bringing about a better state of affairs concerning these and all other street railway lines in this city, consistent with a reasonable protection of the property in its charge.

"Within the next few days we will give to the public a statement respecting this company's undertaking involv-

ing the outlay of much capital for additions and betterments during the current year.

"Respectfully yours,

"J. C. HUTCHINS, *President.*

Defendant also replied to the third resolution, as follows:

July 26, 1910.

To the Honorable Common Council:

"Gentlemen:

"We have received official notice of a resolution adopted by your Honorable Body, under date of July 19, 1910, requiring for the reasons stated therein the Detroit Railway to pay $200 per day in addition to the $300 per day now being paid by this company.

"We suppose that this resolution stands as a substitute for two other resolutions, one under date of June 14, 1910, requiring a payment of $50 and the other under date of June 21, 1910, requiring the company to make a payment of $100 per day.

"We are compelled to advise you that we deny the statement contained in the preamble of said resolution of July 19, 1910, to the effect that the rights of the company have expired on the streets mentioned therein. We are also advised that the requirements to pay such sums of money are illegal for other reasons. We are, therefore, compelled to inform you that we decline to pay said sums of $200 per day in addition to the sum we are now paying.

"We also desire to reiterate what we said to you under date of June 30, 1910, and ask you to consider the statement therein contained as a part of this letter.

"Very truly yours,

"J. C. HUTCHINS, *President.*"

The contention of defendant first to be considered is that which disputes the jurisdiction of a court of equity in this case, upon the ground that complainant has a complete and adequate remedy at law by an action of ejectment. In the briefs and in the argument upon the hearing before this court

there was a divergence of views as to the character of the occupancy of the defendant company upon the streets of the complainant city. It was claimed that such occupancy of these streets by defendant after the expiration of its franchises was in the nature of a tenancy at will, and upon that view that the proceeding against it should have been on the law side of the court. Another claim was that the rights granted to defendant amounted to a right of way or an easement rather than a tenancy. At this time it will not be necessary to devote much attention to the nature of this occupancy.

In this state it is provided by statute that no person may bring an action in ejectment to recover possession of land unless at the time he has a valid subsisting interest in the premises claimed. A municipality acquires no beneficial ownership of the land dedicated to the public use as a street. It has no legal interest or title in the public street of which it can divest itself by deed or other conveyance. The use of such land has already been determined by the dedication to the public use.

By Constitution and statute the supervision and reasonable control of all streets are given to municipalities, but such powers extend no further. Complainant, therefore, has no such interest in the premises, within the meaning of the statute, as would authorize it to bring ejectment to oust defendant from its streets, and this court has so held in

> Grand Rapids *vs.* Whittlesey, 33 Mich., 109.
> See also Bay County *vs.* Bradley, 39 Mich., 163.
> Taylor *vs.* Gladwin, 40 Mich., 232.

This is conclusive upon the question as to the right of complainant to bring ejectment against defendant. It is therefore not necessary in this connection to discuss the question of the adequacy of the remedy.

This court has held that a municipality may maintain a bill

in equity against a street railway company unlawfully occupying a highway, to compel the removal of its tracks.

Township of Bangor *vs.* Traction Co., 147 Mich., 163. This occupancy of the street unlawfully, as claimed by complainant, was a continuing trespass for the restraint of which complainant was entitled to a writ of injunction, as well as for its removal.

Rhoades *vs.* McNamara, 135 Mich., 644.

In this case the court said that where equity has jurisdiction of a suit to enjoin a continuing trespass, it should give such relief as would finally dispose of every question involved. This is but the reaffirmance of a well-known principle frequently declared by this court, and applies to all cases where equity has once obtained jurisdiction.

It is the contention of the defendant in this case that its rights to use the streets and operate its railway thereon continued indefinitely, even though the original grant was limited to thirty years, and even though never extended by consent of the city; and also, that the railway company, having expended considerable sums in improving tracks, equipment, etc., the city is estopped from insisting upon the expiration of the franchise, or interfering with its continued duration. This is without reference to its contention that these franchises were extended to December 14, 1921, by the ordinance of 1906.

The first contention just stated in the argument advanced is based upon the claim of an implied obligation resting upon both parties after the termination of the period for which the right to operate is granted "that the tracks and other equipment composing the railway shall so long as the public need for the use thereof remains, continue to be used for railway purposes upon such terms, not unreasonable, as the municipal authorities may prescribe; that at the option of the municipality such operation may be continued by the original grantee of the franchise or

by some other organization, provided, however, that in the latter case payment of the fair value of said property shall first be made to the owner thereof."

While this is not all of defendant's claim as to the relation of the parties after the expiration of the franchises it is made prominent in its brief by black faced type and is a sufficient excerpt therefrom to signify that its claim is that the material of the railway must remain permanently. It is true that this is somewhat modified by other argument. This argument seems to be based upon the assumed necessity of the continued use of the tracks of defendant for the comfort and prosperity of the public.

It is evident that the municipal authorities are duly constituted as representing the people of the city, and it is the only governmental agency provided, as municipalities are now constituted, for conserving the interests of the public. For the purpose of carrying out these views of defendant no method is formulated, and there does not appear to be any which the court may utilize unless the idea of perpetuity is accepted. The constitutional agency provided to conserve the interests of the public has in this case expressed what may be considered the desire of public relative to its interests. We think that in advancing this argument the fact is overlooked that constitutionally enacted statutes and ordinances have provided when the terms of these frachises expire, and also determined the contractual relations which were created by the acceptance of franchise lawfully granted. Taking, as we do, this view of the situation, we do not recognize the existence of the implied obligation claimed.

By the terms of the ordinances creating these franchises they terminated by limitation, June 17, June 30, and July 24, 1910, respectively. The rights of defendant created by these grants, unless, as is claimed, there was some extension given, expired contemporaneously with the franchises. These franchises granted by the complainant municipality to the defendant com-

pany and accepted by it constitute in law contracts mutually binding upon both parties. By their terms, as already stated, they expired by limitation. This and other courts have repeatedly held to this effect.

Grand Rapids Bridge Co. *vs.* Prange, 35 Mich., 400;
Rapid Railway *vs.* Mt. Clemens, 118 Mich., 136;
Traverse City Co. *vs.* Traverse City, 130 Mich., 22;
Horner *vs.* Eaton Rapids, 122 Mich., 117:
Scott Co. *vs.* Missouri, 215 U. S., 336;
Louisville Trust Co. *vs.* Cincinnati, 76 Fed., 296, 308;
Same case, 78 Fed., 307;
Cleveland Elec. Ry. *vs.* Cleveland, 204 U. S., 116;
Detroit C. Railway, 184 U. S., 382.

Were these franchises extended by the ordinance of May 2, 1906? It is urged by the defendant company that they were. The grants referred to in the first preamble of said ordinance given below, were granted by the township of Springwells, in 1889 and 1891, and expire in 1921, and affect no territory east of Artillery avenue, which is the western limit of the expiring grants involved in this suit. These grants were in the territory of Springwells township west from Artillery avenue to the River Rouge, which was annexed to the city in 1905, and such grants are not questioned or involved in this suit. The date of their expiration, December 14, 1921, is the date to which defendant contends the expiring grants were extended. This contention will now be considered.

To ascertain the subject concerning which these contracting parties had negotiated, which brought about the enactment of this ordinance and its acceptance, we naturally first turn to the enacting clause, which reads as follows:

"An ordinance in relation to *rates of fare* on Fort Street Railway Line of the Detroit United Railway."

The preambles which follow this notify us: (1st) That defendant, as successors of the original grantees, owned and operated as a line of street railway west of 24th street, constructed, maintained and operated, under grants by Township Board of the Township of Springwells, which provided for a five cent rate of fare from any point in said township to any point in Detroit on said lines; and (2d) that by legislative act of June 8, 1905, annexing part of said township to the city of Detroit said lines of railway are now within the city; and (3d) That complainant city claimed that defendant should put on sale on its cars tickets at the rate of eight for twenty-five cents, each of which to be good for a continuous route on the above lines, whether constructed under township grants, or ordinances of the city during certain hours of the day; (this claim of the city was upon the contention that the ordinance relative to sales of workingmen's tickets within the limits of the city included the territory added later); and (4th) in terms, "the Company and the City agreed that the said several grants of said township may be modified as provided in Section 1, hereinafter set forth, provided the other terms and conditions of such township grants are not to be affected in any way by this agreement." By the foregoing entitling of this ordinance, and the preambles following, the only subject concerning which an agreement was to be entered into was in relation to rates of fare on the Fort Street Lines, and the four preambles distinctly set forth the reasons for such an agreement, as is distinctly shown by the following words: "Therefore, (*i. e.*, by reason of the matters contained in such preambles), it is hereby ordained by the people of the City of Detroit:

> "Section 1. The Detroit United Railway shall for the full term of said township grants issue and sell tickets at the rate of eight tickets for twenty-five cents, each of said tickets to be good for a continuous route between any two points on what is known as the routes of the Fort

> Wayne & Elmwood Railway line, so called, whether constructed under grants from the Township of Springwells or from the city of Detroit, between the hours from 5 a. m. to 6.30 a. m. and the hours of 4.45 and 5.45; but the terms of said township grants in all other respects shall not be modified nor changed, nor shall this ordinance and the acceptance thereof be construed to abridge, enlarge or extend any rights acquired by said railway company, its assignors, or predecessors in title to said several grants from the Township of Springwells."

This, as stated, is the section relied upon by defendant as the basis of its claim that the expired franchises herein before mentioned, were extended to December 14, 1921.

It is urged by defendant that its construction that this ordinance extended these grants in question until 1921 is the only reasonable construction which may be applied to its without eliminating certain portions, and is the necessary construction by inference and presumption. In support of this contention defendant relies upon the case of Binghamton Bridge, 3 Wall. (U. S.) 51, and quotes and relies on the interpretation of legislative contracts laid down in the majority opinion, for the purpose of showing the nature of the case the court was considering, we quote from the syllabus of that case, as follows:

> "The statute of a state may make a contract as well by reference to a previous enactment making one, and extending the rights, etc., granted by the statute in question to a new party, as by direct enactment setting forth the contract in all its particular terms. And a third contract may be made in a subsequent statute by importation from the previously imported contract, in the former statute, and a fourth by importation from a third."

The case is an interesting one and the opinion long. It is apparent that the question presented was entirely different from that involved in the instant case and decides as far as the point claimed is concerned, only that the legislature may em-

body by reference into a subsequent act the terms of a previous legislative contract enacted by it.

It is our opinion that the construction claimed by defendant can only be accepted by importing into this ordinance terms not within the intention of the parties. The construction of such a contract, where susceptible of two meanings, is always in favor of the municipality, where one favors the extension of the rights of a corporation and the other against it. All rights asserted against a municipality must be clearly defined and not raised by inference or presumption.

> Cleveland Electric Ry. *vs.* Cleveland, 204 U. S. 239, 140, *et seq.*, citing:
> Blair *vs.* Chicago, 201 U. S., 400, at p. 471;
> Ginghamton Bridge, 3 Wall. (U. S.) 51, at pp. 74, 75.

We think that it is not necessary to give this ordinance a construction by inference and presumption, and hold that by its plain and unambiguous terms it was restricted to a modification of the township grants as to rate of fare, and any and all other changes or modifications of the terms of said township grants to this railway company were expressly excluded.

It is claimed by defendant that the complainant is estopped from insisting upon the expiration of these franchises by its acts in the premises under which defendant was induced to expend large sums of money in betterments and replacements instead of ordinary repairs. From the record it appears that until the rights of defendant by reason of the contractual relations between the parties expired, complainant had no right to interfere with the conditions of such grants, to prevent defendant from making improvements of any kind on its property, or to require the same to be made.

> Detroit *vs.* Railway Company, 184 U. S. 382, *et seq.*, and cases cited.

Except by the inference claimed to have arisen from the ordinance of 1906, no acts of complainant are shown which would warrant any argument supporting an estoppel, and our construction of this ordinance would seem to leave no support on which this contention might rest, except inaction and passive conduct of the complainant.

It is well settled that no estoppel will arise against a municipality through inaction of its officials.

> Horner *vs.* Eaton Rapids, *supra.*
> Collins *vs.* Grand Rapids, 108 Mich., 675.
> Township of Bangor *vs.* Bay City Traction Co., *supra.*

We hold, therefore, that these franchises were not extended by the ordinance of 1906, but expired by their terms on the respective dates hereinabove given, at which time the contractual relations between these parties ended and all rights in the defendant company to occupy the city streets and maintain and operate a street railway thereon terminated.

Complainant insists that after the expiration of the franchises it had the right to fix any terms it saw fit for the future use of these streets for the operation and maintenance of the street railway, and that any use by the defendant company of such streets for such purposes, beyond the expired term, under the circumstances, would be an acceptance of such terms.

This contention, as stated in complainant's brief, is based upon the assumption that the relations between the parties were "in all respects analogous to those existing between a landlord and tenant of real estate under similar circumstances."

The matter of defining the relations between these parties under the circumstances of this case is not without its difficulties. We think, however, that complainant, in stating its contention that the relations in all respects are analogous to the relations between landlords and tenants of real estate *under similar circumstances* makes an impossible comparison, for the reason that similar circumstances could not arise between an

ordinary landlord and tenant. In the instant case the municipality, which has but a circumscribed interest in its streets, has granted the right to defendant to occupy certain portions of its public streets for the purpose of maintaining and operating thereon a street railway, under certain terms and conditions accepted by it, for a certain length of time, which has expired. This presents a relation which cannot be described as a tenancy. Defendant's rights under the franchises terminated by their express provisions, and, because of the interest of a municipality in and to its streets, no such relation as a tenancy has been created or can exist.

The right of defendant was an incorporeal right, created for the public use, which imposed no additional servitude upon the public streets. This court has held that the use of a city street by a street railway is in furtherance of the business for which the street is established and relieves the pressure of local business and local travel; that such railways are only a modern and improved use of the street as a public way and necessary in populous cities. "The use is the same, the method only different."

> Detroit City Railway *vs.* Mills, 85 Mich., 634, 654, and cases cited; citing and approving the dictum of the court in G. R. & I. R. R. Co. *vs.* Heisel, 38 Mich., 66, 67.

The defendant company never acquiesced in or accepted the terms imposed in case of the use of these streets by defendant after the expiration of the franchises. On the contrary, by written notice the complainant was notified of its claim that the franchises had not expired, that the charges fixed for a further use of the streets was excessive and confiscatory, and that it would not accept the same. This position thus taken by defendant has been the subject of determination in this litigation. The cases cited by complainant in support of its contention are not in point, because the relations of the parties in those cases

in no instance are similar to those in the instant case, and the subsequent user by defendant having been in defiance of complainant's claim, did not establish an acceptance. *While the cases cited to the effect that a municipality on the expiration of the franchises of a street railway, may impose such terms as it sees fit for the further use, are accepted authority, none of them determined that they become operative without acceptance by the railway.* No authority has been cited to the effect that a municipality may arbitrarily, without consent of the grantee, impose terms upon a street railway in granting franchises. Such a holding would be repugnant to the universally accepted doctrine that such franchises are mutual contracts.

The contention is made on behalf of the defendant that the creation of the Michigan Railroad Commission took from the municipality of Detroit the right to locally control the operation of the Detroit United Railway, and much space is given to this contention in one of the briefs of defendant. We do not undertake to consider this argument at length and can give but a brief outline of defendant's claim. The argument proceeds upon the assumption that street railways have been by the legislature placed upon the same footing as general railroads. Upon this hypothesis they claim the law to be settled that—

> (a) The franchise to be a corporation is a grant from the state.
>
> (b) The franchise to engage in the business of constructing, operating and maintaining street railways comes from the state.
>
> (c) The franchise to charge toll for the carriage of passengers and freight over any railroad owned by the company is a franchise which comes from the state.
>
> (d) The right to occupy the public street or highway with a railroad and to construct, maintain and operate a railroad upon the public streets or highways is a franchise granted by the state."

Having stated these four propositions to be the settled law the arguments proceeds upon the assumption that these included and provided for all of the rights which a corporation endowed with these rights might require in order to proceed to construct, maintain and operate a railroad upon the public streets. It is true that the authority to incorporate; to engage in the business of constructing and operating a street railway; to charge tolls for carrying passengers and freight; to occupy the public streets, emanates from the state. The same is true of the fundamental rights of any corporation authorized to exist by the constitution and laws of this state, but it is also true that all municipalities of this state are given by statute the supervision and reasonable control of all public streets and highways within their respective limits, and our attention is called to no provision of law to the contrary. This has always been the policy of this state and in the constitution of 1908, Art. VIII, Section 28, it is provided that:

> "No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefore from such city, village or township. The rights of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

The laws authorizing the organization of companies to operate street railways within municipalities of this state all have provisions that corporations so organized are not authorized to enter upon and construct such railways without the consent of the municipality. The principle of local self gov-

ernment has always been fostered in this state and upheld by this court.

While the legislature, in establishing the Michigan Railroad Commission and fixing its powers, has given it certain specified rights relative to certain street railroads and interurban railways, yet it is evident from the particular legislation referred to that there was no legislative intent to reject the established policy of maintaing local self-government, and to institute a new policy in derogation thereof. Section 45, c, of the Michigan Railroad Commission law, among other things, provides, after giving certain of these powers above referred to, as follows:

> "Provided further, That nothing in this act contained shall apply to street and electric railroads engaged solely in the transportation of passangers within the limits of cities or within a distance of five miles of the boundaries thereof."

The franchises involved in this litigation were all granted for a period not to exceed thirty years and were grants solely for the transportation of passengers, and therefore come within the express proviso above quoted.

It is apparent that the legislature had no intention of providing for the interference by the Michigan Railroad Commission with the authorities of municipalities over their streets, and the contention to the contrary is untenable.

The conclusion to be drawn from our determination of the different propositions discussed is that the contractual relations between these parties ended upon the expiration of the franchises, and all rights in the defendant company to occupy the city streets, and maintain and operate a street railway thereon, then terminated, and defendant thereafter became a trespasser; that complainant has the absolute and unquestioned right at any time to compel the defendant company to

vacate the streets upon which these franchises have expired, and to require it to remove its property therefrom within a reasonable time, and if necessary for that purpose to enforce its rights by a writ of assistance from this court.

From this determination it does not follow that any rights of ownership in and to its property in the public streets used in the maintenance and operation of its railway, are taken from it. On the contrary, it is the settled law that after the expiration of a franchise of a street railway company, such property belongs to it.

Cleveland vs. Cleveland Electric Railway, *supra*. Such ownership necessarily carries with it the right of removal and no arbitrary power is given to the complainant or should be given to it to proceed at once by force to effect such removal. Defendant is entitled to and should be given notice to remove its property within a reasonable time.

In the disposition we made of the questions involved we agree with the determination of the trial court, except in two matters:

(1) We have not declared that defendant has created a nuisance in the streets in question, because we do not think such to be the logical conclusion to be drawn from this opinion. We hold that defendant is committing a continuing trespass, which entitles complainant to the relief indicated.

(2) We have determined that complainant could not arbitrarily fix a fee for the use of these streets by defendant, from which conclusion it follows that this court cannot assume such power.

A decree will be prepared and presented to this court, conforming with the conclusions of this opinion, providing for injunctive and other writs necessary to carry it into effect, and the cause will be remanded for further proceedings. Complainant will recover the costs of both courts.

DECREE OF THE SUPREME COURT OF MICHIGAN.

At a session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the twenty-eighth day of February in the year of our Lord one thousand nine hundred and thirteen.

Present the Honorable

JOSEPH H. STEERE, *Chief Justice,*
JOSEPH B. MOORE,
AARON V. MCALVAY,
FLAVIUS L. BROOKE,
JOHN W. STONE,
RUSSELL C. OSTRANDER,
JOHN E. BIRD,
Associate Justices.

THE CITY OF DETROIT, *Complainant,*
vs.
DETROIT UNITED RAILWAY, *Defendant.*

No. 25,063.

This cause coming on to be heard *de novo* upon the pleadings and proofs therein and having been duly argued by counsel and the Court having given due consideration to the same, it is hereby ordered, adjudged and decreed as follows:

1. That all contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets of the City of Detroit, to wit: On Fort Street west, beginning at Clark Avenue, thence westerly to Artillery Avenue, expired by limitation on July 24, A. D. 1910; and that said Detroit United Railway has no rights or privileges upon or in said streets.

2. That all contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following

named streets in the City of Detroit, to wit: On Fort Street west, from the west line of the Porter Farm across Woodward Avenue to Cadillac Square; on Cadillac Square (south part) from Woodward Avenue to Randolph Street; on Cadillac Square (north part) from Woodward Avenue to Bates Street; on Bates Street from Cadillac Square to Randolph Street; on Randolph Street from Monroe Avenue to Cadillac Square; on Monroe Avenue from Randolph Street to Elmwood Avenue; on Elmwood Avenue from Monroe Avenue to Champlain Street; on Champlain Street from Randolph to Baldwin Avenue; on Helen Avenue from Jefferson Avenue to Champlain Street, expired by limitation on June 30, A. D. 1910, and that the Detroit United Railway has no rights or privileges upon or in said streets; provided the rights of the defendant as assignee and successor in title of the Detroit Railway on Bates Street from Cadillac Square to Farmer Street and on Champlain Street from Concord to Field Avenue, shall not be hereby impaired or interfered with.

3. That all contract rights, all privileges and all franchise rights of the Detroit United Railway upon the following named streets in the City of Detroit, to wit: On Fort Street west beginning at a point on said street where the same intersects the west line of the Porter Farm, thence westerly on said Fort Street west to Clarke Avenue, thence southerly on Clark Avenue to West Jefferson Avenue, thence westerly on said avenue to a point opposite Fort Wayne, to wit: Artillery Avenue, expired by limitation on June 17, A. D. 1910; and that said Detroit United Railway has no rights or privileges upon or in said streets.

4. That the defendant, the Detroit United Railway, refused to accept or to comply with the terms sought to be imposed by the resolutions of the Common Council of the City of Detroit (of which Exhibits T, S and Q, attached to the bill of complaint, are copies) for the operation of its tracks on said streets

wherein its rights have expired, as hereinbefore set forth; that, therefore, the terms and conditions of operation stated in said resolutions never became binding upon the defendant; that the defendant company is not liable to make the payments for the use of said streets as required by the terms of said resolutions, or any of them.

5. That by reason of said defendant's refusal to comply with the terms of the resolutions of the Common Council of the City of Detroit (of which T, S and Q set forth in the bill of complaint, are copies) the defendant is without any rights in or to said streets, and it has been and is a trespasser in continuing to occupy them and operate cars thereon.

6. That defendant continues to be the owner of all its property in the public streets used in the maintenance and operation of its railway, and that complainant may by resolution of its Common Council require said defendant to cease the operation of its cars upon and over said streets and to remove therefrom all of said property; that if the complainant shall by resolution of its Common Council, as aforesaid, require and direct the cessation of street railway operation upon said streets, said defendant shall cease said operation within ten days from the time it receives notice of said resolution, unless said resolution prescribes a longer time or said time be extended by said Common Council; that if the complainant shall by resolution of the Common Council require the removal of the defendant's property from said streets, such removal shall be effected by said defendant within ninety days after notice of said resolution, unless said resolution give a longer time or said time be extended by said Common Council by a like resolution. In removing said property from said streets defendant shall not disturb the pavement thereon more than is necessary and shall keep said street open for public travel and shall promptly restore the pavement in fit condition for public travel under the supervision and to the satisfaction of the Department of Public Works of the City of Detroit.

7. It is further decreed that in case of the passage of such resolution, if the defendant shall not cease operation of its cars upon said streets within the time allowed therefor after notice of such resolution or within any extended time that may be allowed, then the Circuit Court of the County of Wayne, in Chancery, to which the case is remanded, upon application of complainant shall forthwith issue its peremptory writ of injunction to enforce the cessation of operation of cars upon said streets, and if the defendant shall not remove all of its property from said streets within the time allowed therefor after notice of such resolution, or within any extended time that may be allowed, then the said Circuit Court in Chancery, upon like application, shall forthwith issue its Writ of Assistance to compel and effect the removal of the defendant's property from said street.

8. And it is further decreed that the said complainant shall recover its costs of both courts in this suit to be taxed against said defendant, and that it have execution therefor.

State of Michigan, ss.:

I, Charles C. Hopkins, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of a decree entered in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original decree.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 28th day of March, in the year of our Lord one thousand nine hundred and thirteen.

CHAS. C. HOPKINS,
Clerk.
By JAY MERTZ,
Deputy.

(SEAL.)

INDEX.

IN THE SUPREME COURT OF THE UNITED STATES.

DETROIT UNITED RAILWAY,
Plaintiff in Error,
vs.
CITY OF DETROIT,
Defendant in Error.

No. 1047.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION TO DISMISS, AFFIRM OR ADVANCE.

I.

Before considering the merits of the motion we think it our duty to raise a preliminary question:

Is not the character and form of the motion to dismiss or affirm such that it ought not to be considered, or, if considered, that it ought not to be granted?

Our assignments of error (printed copies of which, and of the petition for writ of error, are attached hereto raise several Federal questions (see assignments of error numbers 5, 6, 7, 8, 12, 15, 17 and 18) which are not discussed or even referred to in the motion of defendant in error; nor has defendant in error printed, in connection with its motion, such parts of the record as are needed in the consideration of these questions, nor even such as are needed in the discussion of those questions that are referred to in its motion.

Counsel for plaintiff in error have discussed two Federal questions, and only two, of those relied upon by plaintiff in error. The only reason given for not discussing the others is this (see their brief, p. 8):

> "The defendant (appellant) claims two Federal questions are involved authorizing the appeal, and only two."

This statement is unwarranted. It is true that those were the only questions specifically discussed in the petition for the writ, but the other Federal questions were not thereby waived, as shown by the following quotation from Part IV of said petition: (Appendix this brief p. 42).

> "Your petitioner presents herewith its assignments of error raising the foregoing and other Federal questions."

To entitle defendant in error to a dismissal upon the ground that there is no Federal question in the record, must not its counsel *show* that there is no Federal question? Must they not show that every one of the questions which plaintiff in error claims to be a Federal question is not such? Do they do all that is incumbent upon them by discussing two of many questions which plaintiff in error claim to be Federal questions? To entitle defendant in error to an affirmance of the judgment because the appeal "is taken on frivolous grounds and for delay," must not its counsel discuss each Federal question relied upon, or at least present a record warranting its discussion?

We think that the Court must answer these questions by saying that the character and scope of defendant's motion to dismiss, if sufficiently broad to entitle it to consideration, is too narrow to entitle it to relief. It may, however, be said that though the motion is too narrow to be granted, it is none the less sufficiently broad to justify the Court in denying it.

II.

STATEMENT OF FACTS.

The statement of facts in the brief of defendant in error is both inaccurate and incomplete. We think a proper understanding of the case requires another statement which we venture to make.

Plaintiff in error owns and operates all the street railways in the City of Detroit—consisting of about one hundred and ninety miles of track—and many miles of interurban street railways running from said City into the adjacent territory. Its principal east and west line in said City of Detroit is called the Fort Street Line. Over this line are operated both City and interurban cars.

That the Court may more readily understand the situation, we have taken the liberty of inserting at the conclu-

sion of this brief a map showing the entire Fort Street Line and the streets in which it is located. The street in the Western part of the map designated as "Jefferson Avenue" was formerly called "River Road."

Involved in this case, according to the decision of the Supreme Court of the State of Michigan—indeed, according to its decision, the principal question involved in this case—is the obligation of plaintiff in error to cease operating and to remove from the streets that portion of said Fort Street railway lying between Artillery Avenue on the west and Elmwood Avenue on the east. (Artillery Avenue is about three and one-half miles west of the center of the City, and Elmwood Avenue about two miles east of the center.) This portion of the railway consists of about eight miles of double track, or sixteen miles of single track, has a reproductive value of over $100,000 per mile and over it are carried 18,000 passengers each day. This portion was constructed under three separate grants—one expiring June 30, 1910, one June 17, 1910, and one July 24, 1910.

Just prior to each date last above mentioned the Common Council of the City of Detroit adopted a resolution prescribing the terms under which plaintiff in error might continue to operate. These resolutions are "T," "S" and "Q" (Rec., Vol. 1, pp. 27-33). They are substantially similar and it will be sufficient for the Court to examine the one last adopted, viz., resolution Exhibit "Q" (Rec., Vol. 1, pp. 31-33) adopted July 19, 1910. This resolution is set forth in the opinion of the Supreme Court of the State of Michigan and will be found on pages 31-33 of the motion of defendant in error. After reciting the adoption of the preceding resolutions and that the right of plaintiff in error to operate cars on the streets therein named has expired, it concludes:

> "Therefore, that upon the following terms and conditions, and upon no other, consent, permission and authority is hereby granted to the Detroit United Railway to operate its cars upon the streets and portions of streets last above set forth . . . upon payment weekly by the Detroit United Railway to the City Treasurer of the sum of Two Hundred Dollars ($200) for each day that the streets last above set forth are used by said Company in the operation of its railway or railways, and except upon the foregoing terms and conditions, consent, permission and authority are hereby refused and denied."

Plaintiff in error replied to each of these resolutions (these replies are also set forth in the opinion of the Michigan Supreme Court [See defendant's brief, pp. 33 and 35]) denying that its rights in the streets mentioned had expired and insisting that the demand was illegal and declining to comply therewith.

Plaintiff in error continued to operate its street car lines and nothing further was done until August 2, 1910, when the Common Council of the City of Detroit adopted a resolution (Rec., Vol. 1, p. 76) authorizing and instructing the Corporation Council "to institute such legal proceedings as may by him be deemed necessary to enforce the collection from the Detroit United Railway of the sum of Two Hundred Dollars ($200) per day, in addition to the sum said Company is now paying, which is fully set forth in a resolution of July 19, 1910." Acting in pursuance of this resolution, the Corporation Counsel of the City of Detroit instituted this suit by filing a bill in the Wayne Circuit Court, in Chancery, on September 15, 1910. Plaintiff in error filed an answer and cross-bill (see Rec., Vol. 1, pp. 34-68) setting forth, among other facts (see Rec., pp. 43-46) those more particularly hereinafter stated relative to a contract made with the City May 2, 1906, and claiming that this contract granted it the right to operate over the portions of the street in controversy until December 4, 1921 The answer also made the claim more particularly hereinafter stated that, notwithstanding the termination of the grant, it was contemplated by the parties that street railway facilities should continue to be furnished upon this line of railway. It was further claimed (Rec., p. 46) that the resolutions impaired the obligations of the contracts of plaintiff in error, in violation of Section 10, Article I of the Constitution of the United States, and deprived it of its property without due process of law, in contravention of the Fourteenth Amendment.

The Supreme Court of Michigan decided that the right of plaintiff in error to operate was not extended by the contract of May 2, 1906; that all its rights or privileges in the streets ceased at the termination of the period of its grant (see decree attached to the brief of defendant in error, pp. 49 and 50); that it had not accepted the two-hundred-dollar-per-day resolution; that "therefore, the terms and conditions of operation stated in said resolution never became binding upon the defendant; that the defendant company is not liable to make payment for the use of said streets, as required by the terms of said resolution," but that by reason of its refusal to comply with those terms, plaintiff

in error became "a trespasser in continuing to occupy the streets and to operate cars thereon" (defendant's brief, p. 51) and ordered plaintiff in error to cease operating its cars upon said streets and to remove therefrom all its property in accordance with a resolution to be passed by the Common Council of the City of Detroit. Plaintiff in error to have at least ten days after notice of said resolution to comply with the order to cease operation and at least ninety days to comply with the order of removal—though the Common Council, and no one else, might give a longer time. The decree also ordered plaintiff in error, after the removal of said property, to "promptly restore the pavement in fit condition for public travel" (See decree, brief of defendant in error, p. 51).

THE FEDERAL QUESTION.

The Federal question which counsel for plaintiff in error will undertake to show is involved is stated in the petition as follows:

The Supreme Court of Michigan erred in giving to resolutions of the Common Council of the City of Detroit heretofore passed and to be hereafter passed—which resolutions have the force of law—the effect of impairing the obligations of contracts of your petitioner, contrary to Section 10, Article I. of the Constitution of the United States, and in depriving it of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

The brief of counsel for defendant in error (p. 8) contains what purports to be our statement of this proposition but, curiously enough, there is omitted from the proposition as there quoted all reference to the resolution to be hereafter passed. Just how this omission occurred counsel for plaintiff in error are unable to say. It cannot be explained upon the ground that emphasis was not otherwise placed upon it in our petition for writ of error, for we there said: (Appendix this brief p. 42.)

> "And when the Court decreed, as it did * * * that your petitioner should cease operation and remove its track, in compliance with the resolution to be passed by said Common Council of the said City of Detroit, it gave to said resolution to be passed the effect of a law impairing the obligations of said contracts," etc.

It cannot be explained upon the ground that said resolution to be passed was not referred to in the assignments of error. It was specifically mentioned in numerous assignments of error. (See assignments of error 1, 2, 3, 9, 10, 14, 16 and 19.)

CONTRACTS WHOSE OBLIGATIONS ARE IMPAIRED BY THE RESOLUTIONS.

These are (a) the contract contained in the ordinance Exhibit "H," enacted May 2, 1906, and (b) the implied contract that the railway and other property of plaintiff in error should, instead of being removed upon the termination of the period for which the right of operation is granted—the contract under which it was constructed being silent upon this subject—continue in place and in use for the purpose to which it is devoted, on terms that are reasonable and in conformity with the rights of the City, the public and your petitioner.

In making this statement we eliminate all claims respecting questions and contracts which counsel for defendant in error (see their brief, pp. 9, 10 and 22) say we cannot make because of statements made or omitted to be made in briefs filed in the State Court. We eliminate these, not because there is no issue between opposing counsel and ourselves upon the proposition that those claims are waived, but because that issue cannot be determined without examining many pages of printed briefs not before the Court, and because in our judgment the Court need not determine that issue in deciding this motion.

ARGUMENT.

MOTION TO DISMISS.

Did the Supreme Court of Michigan err in giving an effect to the resolutions of the Common Council passed and to be thereafter passed which impairs the obligation of the contracts above referred to? Or [to state the same question in different language], did the Supreme Court of Michigan err in deciding that plaintiff in error had no

contract entitling it to continue to operate its cars or to have its property continued in use for that purpose, so that it became a trespasser by refusing to comply with the terms of the resolutions passed by the Common Council and that it must cease operation and remove its tracks, in compliance with resolutions to be afterwards passed by said Common Council?

Is this question—if presented by the record—a Federal question? Opposing counsel apparently concede that it is. Whoever denies this must affirm each of the following propositions: (a) That the resolutions are not *laws* within the meaning of Section 10, Article I. of the Constitution of the United States; (b) that the resolutions are not acts of the State within the meaning of the Fourteenth Amendment of the Constitution. We insist that a Federal question is presented under each of these Constitutional provisions. The resolutions (both the past and future resolutions) are enactments of a local legislative body acting in a legislative capacity. The question involved—that of whether or not the public shall be deprived of important street car facilities—is legislative in its nature and should be determined by legislative considerations. If the resolutions took the form of ordinances—as at the pleasure of the Common Council they might—they would be laws, according to many decisions of this Court.

See

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 142, 148 and cases therein cited.

Surely, the circumstance that the Common Council called them resolutions does not change their character.

That the resolutions already passed, in so far as they require the Company to pay a rental of $200 per day are legislative in their nature no one would deny; but that question is unimportant because the Court gave no effect to that part of the resolutions. The Court did, however, as we shall hereinafter show, give to the resolutions the effect of making plaintiff in error a trespasser by continuing to operate its cars after refusing to comply with the terms specified (see Brief of Defendant in Error, p. 51). The Court probably did this because resolution "Q" denied the Company the right to operate except in accordance with those terms. The action of the Council in denying the Company's right to operate except in accordance

with specified terms was just as much legislation as was its action in specifying those terms.

If these resolutions are not laws within the meaning of Section 10, Article 1. of the Constitution, they are, under Section 1 of the Fourteenth Amendment of the Federal Constitution, acts of the State depriving the Company of its property—its contract rights—without due process of law. They are, in the language of Judge Wellborn (*see Riverside Co. vs. Riverside,* 118 Fed. Rep. 736, 741) "imputable to the State under Section 1 of the Fourteenth Amendment." That they are either laws within the meaning of Section 10, Article I., or action of the State within the meaning of the Fourteenth Amendment, is settled by the decision of this Court in *Pacific Ry. Co. vs. Los Angeles,* 194 U. S. 112, 117, 118, and the authorities therein cited.

It is denied, however, that this question is presented by the record. Upon page 14 of their brief, counsel for defendant in error say:

> "There is not a line or word or syllable in the opinion of the decree of the Michigan Supreme Court which tends to give to the resolutions the effect of cutting off any contract rights of appellant."

It is true they are speaking only of the resolutions passed before the suit was commenced. A fair statement of our proposition, however, required them to discuss, and requires the Court to consider, not merely the effect of the resolutions theretofore passed but of the resolution to be thereafter passed.

Whether or no the *opinion* of the Supreme Court gives to the resolutions the effect contended for, we claim that the *decree* does, and if it does that is enough.

We quote from the recent opinion of this Court, written by Mr. Justice Holmes, in

Fisher vs. New Orleans, 218 U. S. 440:

> "But it is said that this Court is not limited to the mere language of the opinion but will consider the substance and effect of the judgment (McCullough vs. Virginia, 172 U. S. 102, 116, 117; Hubert vs. New Orleans, 215 U. S. 170, 175) and that this court will decide for itself, with due respect for the State decision, whether a contract had been made, and what it was (Sullivan vs. Texas, 207 U. S. 416, 423). Both of these statements are true, of course,

and are relevant when a judgment really gives effect to a later act of the State that would impair the obligation of the contract if the contract were as alleged."

Most of the foregoing language is found in a quotation from this opinion on page 18 of the brief of opposing counsel.

To show that the decree of the Supreme Court of Michigan did give to these resolutions the effect of cutting off the contract rights of plaintiff in error, we quote Sections 5 and 6 of that decree found in the appendix to the brief of opposing counsel (p. 51):

"5. That by reason of said defendant's refusal to comply with the terms of the resolutions of the Common Council of the City of Detroit (of which T, S and Q set forth in the bill of complaint, are copies) the defendant is without any rights in or to said streets, and it has been and is a trespasser in continuing to occupy them and operate cars thereon.

"6. That defendant continues to be the owner of all its property in the public streets used in the maintenance and operation of its railway, and that complainant may by resolution of its Common Council require said defendant to cease the operation of its cars upon and over said streets and to remove therefrom all of said property; that if the complainant shall by resolution of its Common Council, as aforesaid, require and direct the cessation of street railway operation upon said streets, said defendant shall cease said operation within ten days from the time it receives notice of said resolution, unless said resolution prescribes a longer time or said time be extended by said Common Council; that if the complainant shall by resolution of the Common Council require the removal of the defendant's property from said streets, such removal shall be effected by said defendant within ninety days after notice of said resolution, unless said resolution give a longer time or said time be extended by said Common Council by a like resolution. In removing said property from said streets defendant shall not disturb the pavement thereon more than is necessary and shall keep said street open for public travel and shall promptly restore the pavement in fit condition for public travel under the supervision and to the satisfac-

tion of the Department of Public Works of the City of Detroit."

Though this decree determines that plaintiff in error is not bound to pay the rental specified in these resolutions, it none the less gives the resolutions the effect of making continued operation wrongful. This was doubtless because of the language inserted in the last of said resolutions—Exhibit "Q"; Except upon the foregoing terms and conditions, consent, permission and authority (to continue operation) are hereby refused and denied." We think it obvious that but for these resolutions continued street car operation would not have been adjudged wrongful and that if not adjudged wrongful the decree for its cessation and the removal of track would not have been made. We need not, however, dwell on this point because, whether there is or is not given to the resolutions theretofore passed the effect of cutting off the contract rights of plaintiff in error, such effect is certainly given to the resolution to be thereafter passed. This is so obvious that it is scarcely a fit subject for discussion. The Company is adjudged to be the owner of all its property in the streets and complainant adjudged to have the right by resolution of its common council to require the company to cease the operation of its cars and to remove said tracks, said operation to cease within ten days and said track to be removed within ninety days after notice of said resolution, unless said resolution prescribes a longer time.

Under this decree the Company can continue to operate forever unless said resolution is passed, and if it is passed, operation must cease and the tracks be removed. The decree does not reserve to the Court any right to review the action of the Council in passing said resolution or to relieve the Company from the consequences. On the contrary, Section 7 of the decree (see appendix to opposing counsel's brief, p. 52) makes it the imperative duty of the lower State Court—not the Supreme Court—to enforce those consequences by peremptory writ of injunction and by a writ of assistance. Under this decree, then, it is the resolution which has the effect of cutting off the contract rights of plaintiff in error.

This argument, in substance, was contained in the petition for writ of error. It is not answered or criticised in the brief of defendant in error. If there are any arguments against it, they must be discovered without the aid of opposing counsel.

Possibly it may be argued that when one's contract obligations are alleged to be impaired by a decree giving effect to ordinances or resolutions to be thereafter passed he has not the same right to a writ of error as he would have if the ordinance or resolution had been theretofore enacted. If this argument is suggested we think it is answered by these considerations: At some stage in these proceedings, before taking its track from the street, plaintiff in error has a right to invoke the jurisdiction of this Court, upon the ground that the resolution impaired the obligations of its contracts. Otherwise, the Supreme Court of the State, by giving, in advance, effect to a resolution to be thereafter passed, could deprive a party of the Constitutional right of having his case heard in this Court. The question is, then, at what stage in the proceedings in such a case has a party the right to procure a writ of error? It must be said either that he can procure it as soon as the highest court in the State renders its final decree, or that he must wait until the Common Council has passed the resolution. A writ of error from the Supreme Court of the United States will not issue to review the action of the Council in passing said resolution. It will in such cases issue only to review "a final judgment or decree in the highest court of a State in which a decision could be had" (I U. S. Rev. St., Sec. 709) and this writ must issue within two years. The Supreme Court of Michigan has made its final decree. That court is the highest court in the State in which a decision could be had. If plaintiff in error cannot apply for the writ until the Council has passed the resolution, he may be compelled to wait until after the lapse of the period of two years in which the writ must issue. It is the decree that makes the resolution effective though the passage of that resolution is deferred.

We do not suppose that any point will be made of the circumstance that plaintiff in error in his answer did not claim that the resolution to be thereafter passed impaired the obligations of its contracts. That claim was not specifically made and it could not be made. Plaintiff in error did, however, in its answer set forth these contracts (see Record, Vol. 1, pp. 43, 44, 45, 46, 48 and 49) and it claimed (Rec., 46) that their obligations were impaired by the resolutions already passed "in violation of Section 10, Article I. of the Constitution of the United States." It was also there claimed that the resolution violated the Foureenth Amendment of the Constitution of the United States. This was all that plaintiff in error could do, and it was quite enough to inform opposing counsel and the

State Courts that we claimed that the Constitution of the United States protected our contract obligations from impairment by resolutions enacted by the Common Council of the City of Detroit. The point that a resolution to be passed was an impairment of its contract obligations could not be raised until the decree was signed. The only way it could be raised after that would be to make a motion for a rehearing. This motion would be ineffectual to raise it unless the Supreme Court granted the motion or wrote an opinion discussing it.

Forbes vs. State Council of Virginia, 216 U. S. 396.

In other words, in such a case there is no way by which an aggrieved party can make a record in the State Court of his claim that his contract obligations are impaired by the resolution. It must follow, therefore, either that he will be excused from making it or that he will be deprived of his Constitutional right to have his case reviewed. We submit that he is not to be deprived of that right.

Possibly it may be contended that because Section 6 of the decree was, in substance, one that was drafted by the Company's counsel (and this was referred to in our petition for writ of error (Appendix this brief p. 40) the Company cannot rely upon this section as raising a Federal question. This contention if made involves a consideration of the proceedings leading up to the settlement of the decree. These proceedings, though not shown in the record, are shown in the briefs prepared for the settlement of the decree copies of which we think were filed with the record returned upon the present writ of error. From those proceedings it appears—as whoever may make this contention must admit —that the folowing are the material facts.

On the settlement of the decree which the Court directed to "be prepared and presented conforming with the conclusions of this (its) opinion" (Brief of Defendant in Error, p. 48) the City and the Company each prepared a draft. The City's draft contained Section 5 of the decree that was entered, heretofore quoted, and then provided that the Company's operation of cars cease within ten days and that its cars be removed within thirty day unless it obtained permission from the Common Council to operate and to retain its tracks. The Company's draft contained a provision—substantially that stated in Section 6 of the decree—respecting the cessation of operation and the removal of track. This provision is,

we submit, in conformity with the following conclusion stated in the Court's opinion (see Brief of Defendant in Error, p. 47):

> "That complainant has the absolute and unquestioned right at any time to compel the defendant company to vacate the streets upon which these franchises have expired and to require it to remove its property therefrom within a reasonable time."

Our draft also contained, as the decree does not, a provision that the Court might extend the time fixed by the Common Council for cessation and removal.

Upon the argument to settle the decree the Company's counsel contended that the City had not, by the resolutions theretofore passed, determined that street car operations should cease and the tracks be removed, that this determination involved a question of municipal policy, was essentially legislative in its nature and must be made, and made by the City authorities, and not by the Court, before street car operations should cease and the tracks be removed. The City's counsel insisted that by the resolutions already passed that determination had been made. This is made evident by the following quotation from their brief upon the settlement of the decree (p. 11):

> "It (the Company's decree) provides that the defendant (plaintiff in error) shall stop trespassing so many days after the Common Council shall pass another resolution of the same general import as those already passed."

The Supreme Court took this matter under advisement and made the present decree, which accepts some and rejects others of the provisions of each draft and contains also provisions framed by the Court.

We think there are two answers to the contention that the Company cannot rely upon the Federal question presented by the provision of the decree under discussion:

(a) The decree is precisely the decree that the Court should have made, having, apparently, reached the conclusion that the Common Council of the City of Detroit had never determined that street car operations should cease and the tracks be removed. The circumstance that the Company's counsel aided the Court in reaching that conclusion is, we submit, entirely immaterial. The utmost that can be said is that the Company's counsel were instrumental in convincing the Court that the Common

Council of Detroit had not yet determined a question which it, and it alone, could determine. When the Court was convinced of the correctness of this conclusion—as it should have been, and perhaps would have been without the aid of counsel—its duty to insert a provision of the character of Section 6 became obvious.

(b) If the decree had been entered giving the effect which the City's counsel claim for the other resolutions, precisely the same Federal question, would be presented. This is made clear by the following quotation from the opinion of this Court in *City Railway Co. v. Citizens R. R. Co.*, 166 U. S. 557:

> "All that is necessary to establish the jurisdiction of the Court is to show that the complainant had, or claimed in good faith to have, a contract with the City which the latter had attempted to impair."

This is quoted and approved in *Pacific Electric Ry. Co. v. Los Angeles,* 194 U. S. 118.

See also, *Illinois Central R. R. Co. v. Adams,* 180 U. S. 28.

Under this principle it can, we think, be said not only that the decree presented by the City would have raised this Federal question, but that no proper decree could have been made that would not have raised it.

We do not suppose that anyone will argue that the decree does not damage plaintiff in error, because, instead of ordering it to immediately remove its property, it orders it to remove it in accordance with the resolution of the Council. When one party to a litigation is adjudged to hold his property rights at the pleasure of the other party, he is thereby damaged. If this were not so, one could not have reviewed in this court a judgment against him which an adverse party had a right to collect by the issuance of an execution.

Defendant in error contends that the writ of error should be dismissed (see its brief, pp. 13 and 21) because it "had no contract rights to be impaired." In so contending, it must rely upon one or both of the following propositions: (a) This Court is bound by the construction which the Supreme Court of Michigan placed upon the contracts; (b) The construction placed upon the contracts by the Supreme Court of Michigan is so obviously correct that this Court should say that the appeal is taken on frivolous grounds and for delay. We will

consider each of these propositions, though the latter will be considered in connection with our discussion of the motion to affirm.

Is this Court bound by the construction which the Supreme Court of the State of Michigan placed on its contracts? We think it can be said that there is no decision in this Court which indicates that this question should receive an affirmative answer. On the other hand, there are numerous decisions answering it "no."

In

Jefferson Branch Bank vs. Skelly, 1 Black 436, 443,

this Court, speaking through Mr. Justice Wayne, said:

> "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of the State whenever such a court shall adjudge that not to be a contract which has been alleged in the forms of legal proceedings by a litigant to be one within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudications by the Supreme Court of the State, wherein the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligations should be enforced, notwithstanding a contrary conclusion by the Supreme Court of the State. It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the Supreme Court of the State in such a matter, when it entertained a different opinion."

See

Mobile & Ohio R. R. vs. Tennessee, 153 U. S. 493;

McCullough vs. Virginia, 172 U. S. 109, 111.

In

New Orleans Water Co. vs. Louisiana Sugar Co., 125 U. S. 18, 38,

it was said by Mr. Justice Gray, speaking for the Court:

"When the State Court holds that there was a contract conferring certain rights and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and if it is of opinion that it did not confer the right affirmed by the State Court and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the State Court upholds the subsequent law on the ground that the contract did not confer the right claimed, this Court may inquire whether the supposed contract did give the right, because if it did the subsequent law cannot be upheld."

In

Mobile & Ohio R. R. vs. Tennessee, 153 U. S. 486, 492, 495,

this court, speaking through Mr. Justice Jackson, said:

"It is well settled that the decision of the State Court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of the State by its terms or necessary operation gives effect to some provisions of the State law, which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation" (p. 492).

"The grounds upon which the Supreme Court of the State held that the contract claimed by the Railroad Company under the eleventh section of its charter was invalid in no way affects the jurisdiction of this court. The legal existence of the contract itself and its proper construction is necessarily involved in the question of the alleged impairment of the obligation thereof" (p. 495).

In

St. Paul Gas Light Co. vs. St. Paul, 181 U. S. 147,

this court, speaking through Mr. Justice (now Chief Justice) White, said:

> "Because the Supreme Court of Minnesota decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no Federal question is presented for decision. Where subsequent State legislation is asserted to be repugnant to the Constitution of the United States, because such legislation impairs the obligation of the contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract, and its import. And this, though it be in a given case, the State Court has decided that there was no impairment, either because the contract had never existed, or because, from an interpretation of its provisions, it was found that the obligations which it is alleged were impaired never arose."

Read also in this connection the quotation heretofore made from the recent opinion of this court in Fisher vs. New Orleans.

We respectfully submit that the record presents the Federal question heretofore discussed and that the motion to dismiss must be therefore denied.

ARGUMENT ON MOTION TO AFFIRM.

Is the construction placed by the Supreme Court of Michigan upon the contracts heretofore referred to so obviously correct that this court should say that the appeal is taken on frivolous grounds and for delay? This requires a more detailed statement of those contracts than has heretofore been made.

August 5, 1889, the Township Board of Springwells, having due authority in the premises, made a grant (see (Exhibit "E," Rec. Vol. 1, pp. 58-61) to the Fort Wayne & Elmwood Railway Company (the predecessor and assignor of plaintiff in error) of the right to construct certain tracks in said township. Said grant contained these provisions (Rec., Vol. 1, pp. 59 and 60):

> "The term of this agreement shall be for thirty years from the date hereof, and the terms of all previous agreements between the Township Board of said township and said Company shall be, and are hereby, extended to thirty years from the date of this agreement.

> "In collecting fare, the street railway commencing at the intersection of the Dearborn and River Roads, so called; thence by the Dearborn Road and Fort Street to the eastern end of the company's track at the eastern limits of the City of Detroit shall be deemed one route, and from the eastern end of the company's track at the eastern limits of the City of Detroit to the intersection of the Dearborn Road and Fort Street via Clark Avenue and the River and Dearborn Roads shall be deemed another route, and each passenger traveling over either route continuously, either way, over the whole or any portion thereof, shall pay one fare, the amount of which shall not exceed five cents, provided that the fare for each passenger making a continuous trip on either or both routes with the Township of Springwells shall not exceed five cents."

The street in the western part of the map attached to this brief designated as "Jefferson Avenue" was formerly called and is referred to in the grant above named as "River Road."

On the fourteenth of December, 1891 (see Exhibit "F," Rec., Vol. 1, pp. 61 and 62) the Township Board of the Township of Springwells granted to said Fort Wayne & Elmwood Railway Company the right to construct and operate a street railway described as follows:

> "Connecting with the track of said Fort Wayne & Elmwood Railway Company at the intersection of the Dearborn Road and River Road in said township and extending along said River Road in the center thereof to the River Rouge."

In that grant is this language:

> "The terms of this agreement shall be for thirty years from the date hereof, and the terms of all previous agreements between the Township Board of said township and said Company shall be and hereby are extended to thirty years from the date of this agreement. For the purpose of collecting fare, the above described line of track shall be deemed a continuation of the track heretofore laid and now in operation in said township and the City of Detroit, and each passenger traveling over said entire route continuously, either way, or any part thereof, shall pay one fare, the amount of which shall not exceed five (5) cents."

The term of the township grant was thus extended to December 14, 1921.

In 1905 that portion of the territory of Springwells in which were situated the lines of railway described in grants "E" and "F" was annexed to the City of Detroit. A controversy thereupon arose arose between the City and the Company, the City claiming that the Company's obligation to carry passengers within the city limits during workingmen's ticket hours at reduced rates, under an existing city ordinance, extended to the annexed territory; the Company claiming that it had still the right to exact within that territory the fares provided in these Springwells grants. In settlement of this controversy and on May 2, 1906, the City enacted, and the plaintiff in error —as the successor and assignee of the Fort Wayne & Elmwood Railway Company—accepted, the following ordinance (Exhibit "H," Rec., Vol. 1, pp. 67 and 68):

> "AN ORDINANCE in relation to rates of fare on Fort Street railway lines of the Detroit United Railway.
>
> WHEREAS, The Detroit United Railway, as the successor and assignee of the Fort Wayne & Elmwood Railway Company, owns and operated certain lines of street railway, lying west of Twenty-fourth Street, all of which, except those on Fort Street, between Clark and Artillery Avenues, were constructed and are now maintained and operated under grants made to said Fort Wayne & Elmwood Railway Company by the Township Board of the Township of Springwells, and which grants provide for a five-cent rate of fare; each fare to be good for a continuous ride from any point in said township to any point in Detroit on the Fort Wayne & Elmwood Railway lines, so called; and,
>
> WHEREAS, The act of June 8, 1905, annexing certain portions of said Township of Springwells to the City of Detroit, brings the said lines of railway wholly within the said city; and
>
> WHEREAS, It is claimed by the City of Detroit that the said Detroit United Railway should put on sale on its cars tickets at the rate of eight for twenty-five cents, each of which should be good for a continuous ride on the Fort Wayne & Elmwood Railway lines, so-called, whether constructed under said township grants or ordinances of the City of Detroit, between the hours of 5:00 and 6:30 a. m., and between the hours of 4:45 and 5:45 p. m.; and,

WHEREAS, The Company and the city agree that the said several grants from said township may be modified, as provided in Section 1 hereinafter set forth, provided the other terms and conditions of said township grants are not to be affected in any way by this agreement; therefore,

IT IS HEREBY ORDAINED BY THE PEOPLE OF THE CITY OF DETROIT:

SECTION 1. That the Detroit United Railway shall for *the full term of said township grants,* issue and sell tickets at the rate of eight tickets for twenty-five cents, each of said tickets to be good for a continuous ride between any two points on what are known as the routes of the Fort Wayne & Elmwood Railway lines, so called, whether constructed under grants from the Township of Sprinwells or from the City of Detroit, between the hours of 5 a. m. to 6:30 a. m.; and the hours of 4:45 and 5:45 p. m., but the *terms of said township grants in all other respects shall not be modified or changed,* nor shall this ordinance and the acceptance thereof be construed to abridge, enlarge or extend any rights acquired by said railway company, or its assignors or predecessors in title under said several grants from the *Township of Springwells.*

The Detroit United Railway shall file with the City Clerk an acceptance in writing of this ordinance within three days from its approval by the Mayor.

Approved May 2, 1906.

(Sgd.) GEORGE P. CODD,
Mayor.

Attest:
GEORGE T. GASTON,
City Clerk."

Plaintiff in error claims that by this ordinance it obtained the right to continue the operation of its lines in the City of Detroit for the full term of the township grants, or until December 14, 1921. Counsel for defendant in error insist that this court should say that this claim is frivolous and made for delay. The Supreme Court of Michigan did not say this claim was frivolous. The record will show that it heard the argument of this case in June, 1912, and did not decide it until October 1, 1912, and in the opinion deciding it over three pages are given to the serious discussion of this question. It is said, however, by opposing counsel (see their brief, p. 22):

> "That opinion states the facts clearly, quotes the important portions of the ordinances and disposes of the questions in such a clear, concise and convincing manner as to make further discussion quite unnecessary. * * * The decision of the Supreme Court of Michigan is so manifestly and palpably the only one that could be made on this ordinance that any appeal based on this claim must be regarded as frivolous."

We entertain for the Supreme Court of Michigan the highest respect, but we deny that its opinion in this case demonstrates the unsoundness of our position. By the ordinance and its acceptance the City of Detroit and the Detroit United Railway agreed, not by implication but in explicit terms, that the latter "shall, for the full term of said township grants, issue and sell tickets at the rate of eight tickets for twenty-five cents, each of said tickets to be good for a continuous ride between any two points on what are known as the routes of the Fort Wayne & Elmwood lines, so called, whether constructed under grants from the Township of Springwells or from the City of Detroit, between the hours of 5:00 a. m. to 6:30 a. m., and the hours of 4:45 and 5:45 p. m." Here is an explicit agreement that for the full term of said township grants the railway shall, during certain specified hours, carry passengers on the railway lines in question. This agreement is mutual and reciprocal. It imposes obligations upon and grants rights to each of the parties. Of course, it cannot be performed unless the lines referred to continue in existence.

It may also be argued that the language "but the terms of said township grants in all other respects shall not be modified or changed," immediately following that above quoted, preserves, as applicable to other hours than workingmen's hours, that term of the township grant that the payment of a five-cent fare shall, during the life of the township grant, "be good for a continuous ride from any point in said township to any point in Detroit." This point will receive further attention in this brief.

And it may be argued, too, that unless this ordinance is construed as we claim, the Railway Company surrendered its right to exact a five-cent fare during workingmen's hours in the annexed territory without any consideration whatever. There is nothing in the opinion of the Supreme Court of Michigan to answer this reasoning. In that opinion it is said:

> "By the entitling of this ordinance and the preambles the only subject concerning which an agreement was to be entered into was in relation to rates of fare on the Fort Street lines" (Rec., 40).
>
> "This ordinance . . . by its plain and unambiguous terms was restricted to a modification of the township grants as to rate of fare, and any and all other changes or modifications of the terms of said township grants . . . were expressly excluded" (Rec., 42).

Do the title and the preambles show that the only subject concerning which an agreement was to be entered into was that in relation to rates of fare on the Fort Street lines? We respectfully submit that a proper construction of the title (under the statutes of Michigan the ordinance needed no title) and preambles does not indicate an intent that the ordinance should not be as broad as we contend it was. Observe the language of the last preamble:

> "Whereas, the Company and the City agree that the said several grants may be modified as provided in Section 1 hereinafter set forth, provided the other terms and conditions of said township grants are not to be affected in any way by this agreement."

Here is a recital of an intention to make the modification that actually was made in Section 1.

Just why the Supreme Court said that the grant to the Company of the right to carry over lines in the City "for the full terms of said township grants" is by "its plain and unambiguous terms restricted to a modification of the township grants as to rate of fare," we cannot say. We submit that it was said erroneously. And when the Court said, "All other changes or modifications of the terms of said township grants . . . were expressly excluded," it must have intended to say that the language, "But the terms of said township grants in all other respects shall not be modified nor changed" "expressly exclude" all other changes or modifications of the terms of said township grants than those relating to rate of fare. We respectfully submit that whatever this language means, it is not open to the construction thus placed upon it by the Michigan Supreme Court. This language, instead of being construed to cast doubt upon the proper construction of the explicit language immediately preceding, can and should receive a construction in harmony with that explicit language. One of the terms of said township grants was this—that a passenger paying a five-cent fare was entitled during the life of those grants to a continuous ride from any point in said

township to any point in Detroit on the Fort Wayne & Elmwood Railway Line. It can be said, and, as already indicated, we think it should be said, that this is one of the terms of said township grants which the parties have agreed "shall not be modified nor changed." It cannot be said that this is a term which the parties did not have in mind when they made the contract Exhibit "H," for it is expressly referred to in the first preamble.

We respectfully submit that the opinion of the Supreme Court of Michigan does not demonstrate that our construction of the ordinance of 1906 is incorrect.

Counsel for defendant in error says (Brief, p. 22):

> "The precise point raised by the defendant (appellant) is covered by the decision of this Court in Cleveland vs. Railway, 204 U. S. 116, 139, 140 and 141."

In that case the Cleveland Street Railway contended that its franchises were extended by various ordinances enacted by the City. The ordinance having the closest resemblance to that in this case is one authorizing the construction of a railway on Willson Avenue. It is referred to in the opinion (p. 141) and in the statement of facts (pp. 126 and 127). It granted the right to construct a track on Willson Avenue and to operate and maintain the same until July 1, 1914. According to its terms, this line was to be operated in connection with other lines of the grantee (the franchises of which expired in 1905) and a passenger thereon was given the right to a continuous ride over said other lines without the payment of additional fare. It was held that this ordinance did not operate to extend the franchises of said other lines, the Court saying (p. 141):

> "We think that the effect of that ordinance was simply to make it necessary for the Garden Street Branch and the other roads also to comply with the conditions set forth in the ordinance until the expiration of their respective and existing grants, but that ordinance did not thereby extend the various other railroad grants by implication."

The distinction between that ordinance and the one involved in this case is obvious. To make that ordinance similar to the ordinance Exhibit "H," it should have explicitly provided that passengers on the Willson Avenue line should be carried over the other lines "for the full period of the Willson Avenue grant." Had the ordinance contained that language, it is quite obvious that a different

question would have been presented and one that was not disposed of by the reasoning of the opinion.

Another ordinance involved in the Cleveland case was one dated July 17, 1893 (see opinion, p. 140; statement of facts, p. 121), granting the right to extend the railway on Prospect Street and to operate the same until July 13, 1913. We infer from the statement on page 121 that this ordinance gave to the Council authority to require that the cars on Prospect Street be operated over the entire length of any of the lines. While there are other distinctions between that ordinance and the one involved in this case, there is also the same distinction that has been already pointed out in our discussion of the Willson Avenue ordinance.

We are unable to discover that any other ordinance involved in the Cleveland case demands discussion. We submit that the question involved in this case was not presented in that case.

Counsel for defendant in error also refer to 137 Fed. Rep. 111, and 169 Fed. Rep. 308. The case referred to in the 137th is the Cleveland case and is a report of the hearing in the lower court. The case in the 169th is that of Central Trust Company vs. Municipal Traction Company, decided by Judge Knappen sitting as District Judge. There exists between the ordinance involved in that case and the ordinance involved in this the same distinction already pointed out in the Cleveland case.

If the right of plaintiff in error to operate its railway was not extended as claimed, then we insist that there is another contract the obligations of which are impaired by the resolutions heretofore mentioned, viz., an implied contract that the railway and other property of plaintiff in error, instead of being removed upon the termination of the period for which the right of operation was granted—the contract under which it was constructed being silent upon this subject—should continue in place and in use for the purpose to which it is devoted so long as public convenience may require, on terms that are reasonable and in conformity with the rights of the City, the public and the Company.

Public convenience demands the continuance of street car operations on Fort Street in the City of Detroit. The railway on that street is the principal east and west street car line in the City and over it eighteen thousand passengers are carried each day. It is to be inferred that if

the present tracks (having a reproductive value of $100,000 per mile) are torn up, as ordered by the Supreme Court of Michigan, other tracks substantially like them will be constructed and street car operations conducted thereon either by the City or by someone else. The tearing up and relaying of the track will not only cause a great and unnecessary waste but it will seriously and unnecessarily interfere with public travel.

Is there no lawful way of effecting this change of operation without such waste and disturbance? Obviously, the only sensible way to effect this change is that the Company's property be bought at its reasonable value. Is there any obligation to buy it? Of course, there is no obligation to buy unless there is an obligation to sell, nor is there an obligation to sell unless there is an obligation to buy. The question, then, Is there a lawful way of effecting this change of operation without tearing up the track and disturbing public traffic? raises the broader question, Is there between the City and the Company a mutual obligation that the street railway property shall be taken over for what it is reasonably worth?

And the correct answer to this latter question requires the determination of the still broader question—What is to be done with street railway property remaining in the street at the termination of the period for which the right of operation was granted, where the contract under which it was constructed is silent upon the subject, and where the needs of the public demand its continued use? This is a question that this Court referred to, but did not decide, in the Cleveland case. There, after deciding "that the title to the property remains in the Railroad Company," it was said:

> "How that property may be disposed of is not now a matter before this Court. We only hold that the defendant company cannot avail itself of the provisions of the ordinance of January 11, 1904, so far as taking possession of the property of the complainant is concerned."
>
> *204 U. S., 142.*

The ordinance of January 11, 1904 (see original record of Cleveland case, pp. 246, 249) granted to the Forest City Railway Company, referred to in the opinion as the defendant company, the right to operate on the line in controversy, *operation to commence not later than March 23, 1905:* provided that it pay the owner of the tracks, etc., its value as fixed by mutual agreement, if agreement were

reached by December 22, 1904, and failing such agreement, its value as finally adjudicated by a court of competent jurisdiction, payment to be made upon adjudication. It will be seen that what the Court held in that case was that the owner of the property could not be dispossessed by another company without being paid its value.

Now the contract of the parties being silent as to the disposition of the property at the end of the grant, its disposition must be determined by an implication from the terms of the original contract. This is one of those cases referred to in *1 Addison on Contracts,* p. 23, where it is said:

> "It not unfrequently happens that in the course of carrying out a contract circumstances arise which have not been contemplated by the parties, and consequently where no intention has been expressed by them or can be inferred from their acts. In such cases the law prescribes their respective rights and liabilities according to the dictates of justice—that is, of general expediency—and according to what it is presumed their intention would have been had they had those circumstances in their consideration when they made the contract."

But two implications are possible: One that the Company shall remove the property, which means to the owner its reduction to scrap and the loss of substantially all its value, and to the public the loss of its use and a prolonged deprivation of the necessary means of public transportation. The other possible implication is that the property shall remain and continue devoted to the use for which it is designed on terms which are reasonable and in conformity with the rights of the City, the public and the Company. One implication destroys private property and prejudices the public interest. The other conserves the property and preserves the public interest. Which of these implications is more consonant with the rule laid down by Chief Justice Marshall in *Ogden vs. Saunders,* 12 Wheat., 213, 341, that the "parties are supposed to have made those stipulations which as honest, fair and just men they ought to have made," and with the rule laid down by *Blackstone, 3 Commentaries,* p. 158, that contracts "implied by law * * * are such as reason and justice dictate." We are confident that of these two possible implications that will be accepted that is reasonable and just. Whatever may be the objections to the implication that the tracks shall remain in use, they are less weighty than those that may be made to the implication that they shall be removed, and they can, we believe, all be answered by the principles of

the common law. In our judgment the most weighty of the objections to the implication that the property will remain in use rests upon the ground that it will interfere with a muncipality's power to control street car operations.

Under the principles of the common law is there not a rule by which that property may remain in use without any improper interference with that power?

Is not the existence of such a rule indicated by the suggestion that the obligation of the municipality to use the property when and only when the public necessity may require that use is accompanied by a reciprocal obligation on the part of the Company to do whatever is necessary to enable the municipality to control street car operations; for example, if the City wishes to buy, the Company must sell its property for what it is reasonably worth and it must comply with every other requirement of the City which does not confiscate its property.

We think opposing counsel mistaken in saying that this Court has repudiated these views, nor do we think that the Supreme Court of Michigan has demonstrated their unsoundness.

We submit that the motion to affirm should be denied.

Argument on Motion to Advance.

We think that when the Court knows just what public and private interests are involved in this case it will need no further aid from counsel to dispose of this motion.

The public and private interests involved are such as are obvious from the nature of the controversy. If the decision under review is correct, pending this case the City is being deprived of its right to compel the Company to discontinue street car operations upon and remove eight miles of double track now in use, which is a link of a longer line, and the use of which is necessary for public accommodation.

As bearing upon the rental value of the privileges which the City claims are being unlawfully exercised by the Company, it is to be remembered that the City asked for the track here involved a rental of $200 per day and that this is very much in excess per mile of what the City asked and is receiving from the Company for other lines—65 miles of track—the right to operate which it claims has

expired. For those tracks it is receiving $300 per day. On that basis the rental for the tracks in controversy would be less than $74.00 per day.

We respectfully submit that a careful reading of the affidavit of Mr. Lawson (pp. 2-4 of the brief of defendant in error), and that of Mr. Brooks, attached to this brief, will convince the Court that the disposition of this case will not, as claimed by opposing counsel (a) establish that the Company is collecting on other lines a higher fare than it is entitled to receive, (b) have any bearing upon the City's right to make other railway extensions, (c) materially contribute to the settlement of the entire street railway question, or (d) establish that the Company is a trespasser upon any other streets than those in controversy. In short, the principal considerations which should determine the necessity for a speedy disposition of this case appear from the very nature of the case itself. Whether it has characteristics which distinguish it from many other cases on the docket, some of which would be postponed by its advancement, is a question we submit without argument, quite content to accept any disposition of this motion the Court may make.

JOHN C. DONNELLY,
WILLIAM L. CARPENTER,
Counsel for Plaintiff in Error.

APPENDIX.

SUPREME COURT OF THE UNITED STATES.

No. 1047.

DETROIT UNITED RAILWAY,
Defendant in Error,
vs.
CITY OF DETROIT,
Defendant in Error.

UNITED STATES OF AMERICA,
Eastern District of Michigan. } ss.

FRANK W. BROOKS, being duly sworn, deposes and says that he is the Vice-President and General Manager of the Detroit United Railway, the above named plaintiff in error; that he has read the printed copy of the affidavit of the Corporation Counsel of the City of Detroit attached to the motion made by defendant in error in the above entitled cause to dismiss, affirm or advance. In said affidavit is this statement:

> "That, depending on an early disposition of this case, are the rights of the City to get needed railway extensions, lower fares and a settlement of the entire street railway question."

From this and other statements in said affidavit, it would or might be inferred that the decision of this case will determine that the City is entitled to lower fares upon other lines of railway than here in controversy. This inference is hardly warranted by the facts, which are as follows:

Plaintiff in error owns and operates all the street railways—consisting of about 190 miles—within said City of Detroit. It is conceded—and this appears by the affidavit of the Corporation Counsel above referred to—that it has a valid unexpired grant to operate all these railways, except (a) those involved in this case, and (b) the sixty-five miles specified in said affidavit of the Corporation Counsel. Respecting said sixty-five miles, it is true, as stated in said affidavit, the City claims, and the Com-

pany denies, that the right to operate ceased November 14, 1909. It is, however, the fact—which does not appear by the Corporation Counsel's affidavit—that every part of the track embraced in said sixty-five miles is a part of a longer line within the city limits, the remaining parts of which are operated by the Company under franchises which are concededly valid and unexpired and which give it the right to charge the rates of fare it is now collecting.

The issue upon the right to operate said sixty-five miles, as said affidavit states, has never been settled nor been the subject of litigation. It has thus far been unnecessary to determine that issue because of the arrangement stated in the affidavit of the Corporation Counsel by which the Company continues to operate on the terms of the grant and pays, in addition thereto, the sum of $300 a day, with a mutual understanding that neither the Company nor the City thereby waives or prejudices its rights or privileges. Nor does the Company admit that the decision in this case will determine that it has no right to continue the operation upon said sixty-five miles.

From the above quoted statement from the affidavit of the Corporation Counsel, and from other statements therein, it will or might be inferred that other street railways are not being built or street railways are not being extended because prevented by some question involved in this case. There is no question of any kind or nature involved in this case the determination of which has any bearing on the right to build other street railway lines or extensions. On the seventh day of April last the electors of the City of Detroit voted to make such an amendment to the City charter that the City can itself, among other things, build those extensions. Since that time an appropriation has been made for the building by the City of the extension which the City authorities claim is most needed, viz., that on Junction Avenue. Plaintiff in error does not contend or admit that said amendment to the charter is legal or that the extension may be built by the City, but those are questions in no manner involved in this suit and which will not be settled by the determination of any question that is involved.

FRANK W. BROOKS.

Subscribed and sworn to before me this first day of May, 1913.

JOSEPH S. MCDOWELL,
Notary Public, Wayne County, Michigan.
My commission expires August 20, 1915.

STATE OF MICHIGAN

SUPREME COURT

CITY OF DETROIT,
Complainant and Cross-Defendant,
vs.
DETROIT UNITED RAILWAY,
Defendant and Cross-Complainant.

PETITION FOR WRIT OF ERROR.

To HONORABLE WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States:

Your petitioner, the Detroit United Railway, respectfully shows:

I.

I. Your petitioner is the defendant and cross-complainant in the above entitled cause and a corporation organized under "An Act to provide for the formation of street railway companies," the same being Act 35 of the Public Acts of the State of Michigan for the year 1867 found in chapter 168 of the Compiled Laws of the State of Michigan for the year 1897. Said Act (see section 13) authorizes any street railway corporation organized under its provisions to construct, use, maintain and own a street railway for the transportation of passengers in a city or village under such rules, regulations and conditions as said city or village may by ordinance prescribe:

> "But no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms upon which they are permitted to use said

streets, and any such company may extend, construct, use and maintain their road in and along the streets or highways in any township adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the Township Board of the township."

Your petitioner owns and operates all the street railways in the City of Detroit and many miles of interurban street railways running from said city into the adjacent territory. The principal east and west line of railway of your petitioner in said City of Detroit is called the "Fort Street Line." This line extends from Elmwood Avenue on the east—Elmwood Avenue is nearly two miles east of Woodward Avenue, the center of the city—to the extreme western limits of the city. (The western limits are about four and one-half miles west of Woodward Avenue, the center of the city.) East of Woodward Avenue said Fort Street railway has two separate lines on two separate streets, viz., on Monroe Avenue and Champlain Street. West of Woodward Avenue it also has two lines. Both of these lines are on Fort Street, from Woodward Avenue to Clark Avenue. (Clark Avenue is about two and one-half miles west of Woodward Avenue.) West of Clark Avenue one line continues on Fort Street; the other goes south on Clark to West Jefferson, thence west on West Jefferson.

Over that portion of the Fort Street line lying west of Woodward Avenue, your petitioner operates interurban passenger cars running through the City of Detroit from the City of Toledo, Ohio,—about sixty miles distant from Detroit—to the City of Mt. Clemens, Michigan,—about twenty-five miles distant from Detroit—and also interurban cars running between the City of Detroit and the City of Wyandotte and the Villages of Trenton, River Rouge, Ecorse and Ford City, as well as other villages situated between the City of Toledo and the City of Detroit. The lines of street railway situated outside of the City of Detroit upon which said interurban cars are run are owned and operated by your petitioner. (See Record, vol. 2, pp. 89 and 90.)

2. Involved in this case, according to the decision of the Supreme Court of the State of Michigan—indeed, according to its decision, the principal question involved in this case—is the obligation of your petitioner to cease operating and to remove from the streets that portion of the Fort Street railway lying between Artillery Avenue on

the west (Artillery Avenue is about three and one-half miles west of the center of the city) and Elmwood Avenue on the east. This portion of the railway consists of about eight miles of double track, or sixteen miles of single track. This railway has a reproductive value of over $100,000 per mile (Rec., vol. 3, p. 27; Vol. 2, p. 62). It was constructed under three separate municipal grants by a Michigan corporation—to whose rights petitioner succeeded—known as the Fort Street and Elmwood Avenue Railway Company (its name was afterwards changed to the Fort Wayne & Elmwood Railway Company) organized under the Tram, or Train, Railway Act (see Act 145 of the Public Acts of Michigan, 1855, chapter 167, Compiled Laws of 1897), the provisions of which are not essentially different from those of the act under which plaintiff in error is incorporated.

(a) The earliest of the municipal grants under which said portion of the railway in controversy was constructed is contained in an ordinance enacted by the City of Detroit January 31, 1865. (See Rec., Exhibit "Z," volume 1, pp. 13-19.) Under this ordinance all that portion of the railway in controversy east of the west line of the Porter Farm was constructed. (The west line of the Porter Farm was at that time the western city limits and is about two miles west of Woodward Avenue.) Section 20 of that ordinance reads:

> "The powers and privileges conferred by the provisions of this ordinance shall be limited to thirty years from and after the date of its passage."

Subsequently, on June 30, 1880, the City of Detroit amended this ordinance (see Exhibit "X," Rec., Vol. 1, pp. 20 and 21) and provided, among other things, that

> "The powers and privileges conferred and obligations imposed on the Fort Wayne & Elmwood Railway Company by the ordinance passed January 31, 1865, and the amendments thereto, are hereby extended and limited to thirty years from this date."

(b) The second of the municipal grants under which a portion of the railway in controversy was constructed is contained in resolutions adopted by the Township Board of the Township of Springwells, June 17, 1880. (See Exhibit "Y," Rec., Vol. 1, pp. 19 and 20.) These resolutions granted to said Fort Wayne & Elmwood Railway Company the right to extend its railway from the then westerly

limits of the City of Detroit—the west line of the Porter Farm—along Fort Street to Clark Avenue, along Clark Avenue to River Road (West Jefferson Avenue), along River Road to a point opposite Fort Wayne (this is Artillery Avenue.) This right was given "for the term of thirty years from its date." The territory in which this grant was made was annexed to the City of Detroit in 1885. (See Rec., Vol. 1, p. 3.)

(c) The third of the municipal grants under which the remaining portion of the railway in controversy was constructed is contained in an ordinance enacted by the City of Detroit July 24, 1886. (See Exhibit "W," Rec., pp. 21 and 22.) This ordinance grants to the Fort Wayne and Elmwood Railway Company authority to construct, extend, maintain and operate for the term of twenty-four years from the date of its passage, its street railway from Clark Avenue to the westerly limits of the City of Detroit —then Artillery Avenue. (Rec., Vol. 1, p. 3.)

The material difference in these three grants, so far as the questions involved in this case are concerned, relates to the date of their expiration—the earliest expiring June 30, 1910; the second earliest, June 17, 1910; and the latest July 24, 1910.

3. Just prior to each date last above mentioned, the Common Council of the City of Detroit adopted resolutions prescribing the terms under which petitioner might continue to operate the portion of its railway above described. Those resolutions are "T," "S" and "Q." (Rec., Vol. 1, pp. 27-33.) They are substantially similar and it will be sufficient for the Court to examine the last one adopted by the Common Council, viz., Exhibit "Q". (Rec., Vol. 1, pp. 31-33.) That resolution, adopted July 19, 1910, after reciting the adoption of the preceding resolutions and the expiration of the rights of petitioner to operate cars on the streets above described, concludes:

> "THEREFORE, BE IT RESOLVED, That upon the following terms and conditions, and upon no other, consent, permission and authority is hereby granted to the Detroit United Railway to operate its cars upon the streets and portions of streets last above set forth * * * upon payment weekly by the Detroit United Railway to the City Treasurer of the sum of $200 for each day that the streets last above set forth * * * are used by said Company in the operation of its railway or railways, and except upon the foregoing terms and conditions

consent, permission and authority are hereby refused and denied."

To this resolution petitioner replied (see Exhibit "P," Rec., Vol. 1, p. 33) denying the statement that the rights of the Company have expired on the streets mentioned, and insisting that the demand was illegal for other reasons. Your petitioner continued to operate its street car lines, nothing being done until August 2, 1910, when the Common Council of the City of Detroit passed a resolution (Rec., Vol. 1, p. 76) authorizing and instructing the Corporation Counsel

> "To institute such legal proceedings as may by him be deemed necessary to enforce the collection from the Detroit United Railway of the sum of $200 per day in addition to the sum said company is now paying, which is fully set forth in the resolution of July 19, 1910. (See Exhibit "Q.")

4. Acting in pursuance of the resolution of August 2, 1910, the Corporation Counsel of the City of Detroit instituted this suit by filing a bill in the Wayne Circuit Court, in Chancery, on September 15, 1910, wherein the City of Detroit was complainant and your petitioner defendant. Your petitioner filed an answer and cross-bill. The City answered this cross-bill, testimony was taken and a decree made by the Circuit Court. From this decree each party appealed to the Supreme Court of the State of Michigan. That Court, on the twenty-eighth day of February, 1913, made and entered a final decree disposing of the controversy. In that decree the Supreme Court adjudged and decided that the right of your petitioner to operate street railways in that portion of the streets of the City of Detroit covered by subdivision (a) of paragraph 2 of his petition expired June 30, 1910, in that portion covered by subdivision (b), paragraph 3, expired June 17, 1910, and in that portion covered by paragraph (c) expired July 24, 1910; that petitioner was not liable to pay for the use of the streets as required by the terms of the resolutions "T," "S" and "Q," but that by reason of its refusal to comply with those terms your petitioner was a trespasser, in continuing to occupy the streets and operate cars thereon, and ordered petitioner to cease operating its cars upon said streets and to remove therefrom all of its property in accordance with a resolution to be passed by the Common Council of the City of Detroit (petitioner to have at least ten days after notice of said resolution to comply with the order to cease opera-

tions, and at least ninety days to comply with the order of removal.) The decree also ordered the petitioner, after the removal of said property, to "promptly restore the pavement in fit condition for public travel."

Further statements respecting the pleadings and issues are made in connection with the statement of the Federal questions involved.

II.

Your petitioner contends that various Federal questions are in the record, each of which was decided erroneously and adversely to its rights.

1. **In deciding that petitioner in operating cars in the streets was a trespasser, and in ordering it to cease said operation and to remove its property, the Supreme Court of the State of Michigan decided an issue not legitimately presented to it by the pleadings and therefore deprived petitioner of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.**

At the time this suit was instituted (see complainant's bill, paragraph 29), your petitioner was carrying daily, on an average, over eighteen thousand passengers on the streets in question. If your petitioner ceased this operation these passengers could not be served, for the City had then, and has now, no authority to itself engage in the operation of street car transportation, and if the tracks were torn up and a franchise given to some other corporation or persons, months, if not years, would elapse before service could be given by such other grantee. Under these circumstances—and they all appear in complainant's bill, either by statement or by proper legal inference—a court of equity would, petitioner submits, have no lawful authority to order it to cease operations and to remove its track unless the bill upon which it was asked to grant relief showed by proper averment that the legislative body having control of the streets had decided that said operations should cease and said tracks be removed. This is so because, as your petitioner submits, the proposition of whether under those circumstances street car operations should cease is legislative in its nature and is to be deter-

mined by a legislative body. Complainant's bill of complaint not only omits any averment respecting the passage of such a resolution, but by its averments respecting the action of the Council shows affirmatively that no such resolution was ever passed. The bill does show the enactment by said Council of resolutions "T," "S" and "Q" heretofore described. Those resolutions by no means indicate the legislative will of the Council that street car operations should cease and the tracks be removed. On the contrary, they merely indicate the intent of the Council to compel your petitioner to continue street car operations on the terms therein named. It is true that in resolution "Q" (Rec., Vol. 1, p. 33) the Council does say that "except upon the terms therein granted, permission and authority to operate is refused and denied." When it is borne in mind that immediately before the passage of this resolution the Council had received from petitioner a communication (Rec., p. 26) denying, for reasons therein stated, the binding effect of such resolutions, and stating that your petitioner

> "will, in the exercise of its rights and duties, continue to maintain and operate the lines in question under the terms and conditions under which the same are now maintained and operated, and to render service as heretofore,"

it will be seen how far this resolution falls short of a direction to cease operations and to remove the tracks. Your petitioner submits that the language above quoted from resolution "Q" has no other office than that of putting the City of Detroit in a position to claim, as it did claim in its bill of complaint, that petitioner's continued operation thereafter amounted to an acceptance of the terms of said resolution.

It is the duty of your petitioner in this connection to call your Honor's attention to the circumstance that the Supreme Court of Michigan did, by Section 5 of its decree, as hereinafter more specifically stated, construe the language of the resolutions under consideration as an order forbidding your petitioner to operate its cars except in compliance with its terms. Even if we assume that the Supreme Court of the United States is bound by this construction—a proposition denied by petitioner—it fell short of being such a resolution ordering the cessation of operations and the removal of tracks as should have been passed before this suit was instituted. This is made manifest by the circumstance that under the decree of the

Supreme Court (see Section 6) such a resolution must yet be passed before said operations shall cease or said tracks be removed. Moreover, it is quite clear, as your petitioner submits, that it would have failed, and inexcusably failed, to perform an obvious public duty if, in compliance with said resolution it had ceased to transport passengers on its said railway. It would seem from the decree of the Supreme Court of Michigan that the language under consideration was construed as making your petitioner's operation of cars wrongful, but as not obligating it to cease operations and to remove its tracks.

A critical examination of complainant's bill of complaint shows, as your petitioner submits, that its only legal purpose was to obtain a decree that your petitioner had already accepted or must accept the terms of said resolutions "T," "S" and "Q." There is, your petitioner submits, no averment of fact in said bill not appropriate to the granting of said relief, and that relief is specifically prayed for. (Rec., Vol. 1, pp. 11 and 12.) It is true that in paragraph 3 of the prayer (Rec., Vol. 1, p. 7) a decree is asked perpetually restraining your petitioner from operating its railway, and requiring it to remove its tracks; but, as heretofore stated, no averment in the bill warranted any such relief and it may be argued with much force that this prayer is to be read in connection with and is qualified by the following prayer, appearing later in said bill (Rec., Vol. 1, p. 12):

> "And (defendant) shall forthwith pay to your orator the sums therein stipulated, and all accumulations thereof, and if it shall fail to do so, then that said Detroit United Railway be perpetually restrained and enjoined from running or operating street cars upon said streets, and that said Detroit United Railway forthwith from the entry of the decree herein elect to either pay the money due and to become due, mentioned in said resolutions, to the City of Detroit, and abide by and be bound to the terms and conditions imposed in said resolution, or cease forever thereafter running or operating cars upon said streets and remove its said tracks and railway equipment from, out and off said streets and highways."

In construing this bill of complaint there should be borne in mind the circumstance heretofore referred to that it was filed by the Corporation Counsel of the City of Detroit in pursuance of instructions from the Common

Council (Rec., Vol. 1, p. 76) to enforce the collection of the sum of $200 per day. It is true that after this suit was instituted and while it was pending in the Wayne Circuit Court the Common Council of the City of Detroit passed resolutions (Rec., Vol. 2, p. 86) approving and ratifying

> "fully and completely the action of the Corporation Counsel in bringing said lawsuit, and every prayer for relief placed by him in the bill of complaint filed by him as commencement of said suit."

It is quite apparent that, even if we concede that the Common Council could change the status of this case by resolutions passed after its commencement—and we do not concede that, but, on the contrary, deny it—this resolution had no such effect and furnished no argument in answer to the objections hereunder made. Neither can it be said that a resolution (Exhibit "A," Rec., Vol. 2, p. 93) passed by the Common Council of the City of Detroit after the Circuit Court had announced its opinion (Rec., Vol. 2, pp 98-122) and before it entered its decree, in any way affected the question under present discussion. That resolution was passed in response to the following statement in the opinion of the said Circuit Court:

> "While clear that the City has the undoubted right to the relief defined (that is, the cessation of operations and the removal of its track), it is, unless reason to the contrary appears, within the power of the prevailing party to say when that relief shall be granted, and if granted, upon what terms it may be temporarily suspended. We await, therefore, an expression of the City's desire upon the subject before assuming the responsibility of entering the decree awarded and giving its provisions effect. The entry of the decree is therefore withheld until the complainant shall have further indicated its position upon these phases of its rights." (Rec., Vol. 2, p. 122.)

This was an invitation by the Court to the Common Council to advise the Court whether and when it wants the Company's tracks removed and the street car operations to cease. Instead of deciding this legislative question as requested, the Common Council, as will be perceived by said resolution, merely instructed the Corporation Counsel to get an entry of a decree giving the City the relief prayed for in the Judge's opinion, and to get, also, a provision for the payment of back rental and to appeal

from the decree if it does not include all the rights of the City as interpreted by the Corporation Counsel.

The decree of the Circuit Court (see Rec., Vol. 2, pp. 94-96), while deciding, as did the Supreme Court of the State of Michigan, that your petitioner was not bound to operate under the terms of the resolutions "T," "S" and "Q," nevertheless gave it, as complainant prayed it should, the right to operate under said terms. Just why the Supreme Court of the State of Michigan did not also give it that right, your petitioner does not know and cannot conjecture. Under the conclusions it reached in this case and under the prayer in complainant's bill, it was bound to give it that right. By declining to give it, it deprived petitioner of a right to which it was lawfully entitled and thereby deprived it of its property without due process of law.

It may be argued that when the Supreme Court of the State of Michigan inserted in its decree, as it did,—and this was inserted on the motion of your petitioner when the decree was settled,—a provision that street car operations should cease and the track be removed only in accordance with a resolution passed by the Common Council of the City of Detroit, a complete answer to the objection under consideration was furnished. Is this argument sound? In determining whether or not a party is entitled to relief, is not a court, under the due process of law provision of the Fourteenth Amendment, confined to the inquiry, "Is he entitled to relief on the case made by him at the time relief is granted?"

2. The Supreme Court of Michigan erred in giving to resolutions of the Common Council of the City of Detroit heretofore passed and to be hereafter passed—which resolutions have the force of law—the effect of impairing the obligations of contracts of your petitioner, contrary to Section 10, Article 1 of the Constitution of the United States, and in depriving it of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

The contracts the obligations of which petitioner claims to be impaired are three:

(a) A contract contained in the ordinance Exhibit "H" (Rec., pp. 67 and 68) enacted by the City of Detroit

May 2, 1906. By that ordinance it is enacted (see page 67) that

> "the Detroit United Railway shall, for the full term of said township grants (these are the grants referred to in the ordinance, and they do not expire until December 14, 1921), issue and sell tickets at the rate of eight tickets for twenty-five cents; each of said tickets to be good for a continuous ride between any two points on what are known as the routes of the Fort Wayne & Elmwood Railway Line, so called, whether constructed under grants from the Township of Springwells or from the City of Detroit, between the hours of 5 A. M. to 6:30 A. M. and the hours of 4:45 and 5:45 P. M."

Your petitioner contends that a proper construction of this language gives to it the right to carry passengers in accordance with its provisions upon the railway in question until said date December 4, 1921. The opinion of the Supreme Court of the State of Michigan deals with this question and decides it adversely to your petitioner's contention.

(b) Another contract the obligation of which is impaired is contained in agreements made between the Township Board of Springwells and the Fort Wayne & Elmwood Railway Company—to whose rights petitioner succeeded—whereby said Railway Company had the right for thirty years from December 14, 1891, or until December 14, 1921 (see Exhibits "E" and "F," Rec., Vol. 1, pp. 58-62) to carry passengers over its entire route in said City of Detroit and said Township of Springwells. Said City of Detroit became and is obligated by this contract precisely the same as was the Township of Springwells because the territory in which were situated the railways authorized to be constructed by said agreements Exhibits "E" and "F" was annexed to and become a part of the City of Detroit by an act of the Legislature of the State of Michigan approved June 8, 1905. (Rec., Vol. 1, p. 44.)

(c) The other contract the obligation of which is impaired is an implied contract. That implied contract, as your petitioner claims, is this: That the railway and other property of your petitioner should, instead of being removed upon the termination of the period for which the right of operation is granted—the contract under which it was constructed being silent upon this subject—continue in place and in use for the purpose to which it is devoted, on terms that are reasonable and in conformity

with the rights of the City, the public and your petitioner. The validity of this claim was investigated and denied by the Supreme Court of Michigan.

The resolutions to which the Supreme Court gives the effect of impairing the obligations of said contracts are the resolutions "T," "S" and "Q" (particularly "Q") heretofore enacted by the Common Council of the City of Detroit, and the resolution to be hereafter enacted by it, Section 5 of the decree of the Supreme Court of Michigan reads:

> "That, by reason of said defendant's refusal to comply with the terms of the resolutions of the Common Council of the City of Detroit (of which Exhibits "T," "S" and "Q" set forth in the bill of complaint are copies), it, the defendant, is without any rights in or to said streets and is a trespasser in continuing to occupy them and operate cars thereon."

Your petitioner submits that in so decreeing, said Supreme Court construed said resolutions—especially resolution "Q"—as having the force of a legislative enactment making it wrongful for your petitioner to operate said cars except in compliance with its terms, thereby impairing the obligations of petitioner's contracts hereinbefore described. And when the Court decreed, as it did, in Section 6, that your petitioner should cease operation and remove its track, in compliance with a resolution to be passed by said Common Council of the City of Detroit, it gave to said resolution to be passed the effect of a law impairing the obligations of said contracts, contrary to Section 10, Article 1, of the Constitution of the United States, and of depriving petitioner of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

III.

Petitioner further shows that the said decree of said Supreme Court of the State of Michigan was and is a final judgment in the highest court in the State of Michigan in which a decision in said suit could or can be had.

IV.

Your petitioner presents herewith its assignments of error raising the foregoing and other Federal questions.

Your petitioner also presents herewith an exemplified

transcript of the record of the Supreme Court of the State of Michigan in said case, and prays that a writ of error to said Supreme Court be allowed; that citation be granted and signed; that your Honor will fix the penalty of a bond and that upon the approval of said bond and upon compliance with the terms of the statute in such case made and provided said bond and writ of error may operate a supersedeas; that the errors complained of may be reviewed in the Supreme Court of the United States and the judgment and decree aforesaid of said Supreme Court of Michigan be reversed, and that under its cross-bill it be decreed to have the right to continue to operate its railway as herein claimed.

JOHN C. DONNELLY,
WILLIAM L. CARPENTER,
Counsel for Petitioner.

DETROIT UNITED RAILWAY,
By A. E. PETERS,
Its Secretary and Attorney.

UNITED STATES OF AMERICA, }
Eastern District of Michigan. } ss.

On this 12th day of March, A. D. 1913, before me, a Notary Public in and for the County of Wayne and State of Michigan, personally appeared A. E. Peters, its secretary, attorney in fact for the Detroit United Railway, and made oath that he has read the within and foregoing petition subscribed by him as such attorney and knows the contents thereof and that the same is true in substance and in fact.

JANE ATKINSON,
Notary Public,
Wayne County, Michigan.
My Commission expires July 7th, 1913.

The writ of error as prayed for in the foregoing petition is hereby allowed this 14th day of March, A. D. 1913. The writ of error to operate as a supersedeas upon the approval of the bond for that purpose, the penalty of which is hereby fixed at the sum of Fifty Thousand dollars ($50,000).

Dated at Washington, this 14th day of March, A. D. 1913.

WM. R. DAY,
Associate Justice of the Supreme Court of the United States.

UNITED STATES OF AMERICA—SUPREME COURT OF THE UNITED STATES.

DETROIT UNITED RAILWAY,
Plaintiff in Error,
vs.
CITY OF DETROIT,
Defendant in Error.

ASSIGNMENTS OF ERROR.

The Detroit United Railway, plaintiff in error, in connection with its petition for the writ of error herein, makes the following assignments of error, which said Detroit United Railway avers occurred in the final decree and judgment herein:

1. The Supreme Court of the State of Michigan erred in deciding that all contract rights, all privileges and all franchise rights of the plaintiff in error in the streets named in the first, second and third paragraphs of its decree expired on the dates therein mentioned, viz., June 17, 1910, June 30, 1910, and July 24, 1910, and in ordering plaintiff in error to cease the operation of its railway upon said streets and to remove its property therefrom in accordance with a resolution to be passed by the Common Council of said defendant in error. (Said plaintiff in error to have at least ten days after notice to comply with the resolution to cease operations, and at least ninety days after notice to comply with the resolution to remove its property.) Said decision gives to resolutions heretofore passed by said Common Council—which resolutions have the force of law—and to the resolution specifically above referred to to be hereafter passed by said Common Council—which also has the force of law—an effect which impairs the obligation of the contract of plaintiff in error contained in the grant of defendant in error under which said street railways were constructed, and of the contract contained in ordinance Exhibit "H" attached to the answer of plaintiff in error in this case, contrary to Section 10, Article I of the Constitution of the United States, and deprives it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

2. Said Supreme Court of the State of Michigan erred in deciding that the contract made between the plaintiff in error and defendant in error by the ordinance Exhibit "H" in the record did not grant the plaintiff in error the right to operate the railways in question in this suit until the expiration of said Township grants therein mentioned, viz., until 1921. And in ordering said plaintiff in error to cease operating said railways and to remove the same from the streets in accordance with the resolution to be passed by the Common Council of the City of Detroit, said decision gives to the resolutions already passed by said Common Council and to the resolution herein specifically referred to—which resolutions have the force of law—an effect which impairs the obligation of the contract of plaintiff in error contained in the aforesaid ordinance, contrary to Section 10, Article I, of the Constitution of the United States, and deprives it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

3. Said Supreme Court of the State of Michigan erred in deciding that at the expiry of the grants from the City under which the street railways were constructed in the streets of the City of Detroit there was not an implied contract that the tracks and other property should remain in the streets and continue in use for street railway purposes. In deciding that street railway operations on said tracks should cease and the tracks be removed in accordance with a resolution to be passed by the Common Council, said Court gave to the resolutions thertofore enacted by said Common Council, set forth in the record in this cause, and the resolution above specifically referred to—which resolutions have the force of law—an effect which impairs the obligation of the contract of the plaintiff in error above specified, contrary to the terms of Section 10, Article 1, of the Constitution of the Untied States, and deprives it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

4. In deciding as it did that the plaintiff in error had no further right to operate street railways in the streets mentioned in the decree, and in ordering its eviction therefrom, the Supreme Court of the State of Michigan decided an issue not raised by or involved in the pleadings in this case, and therefore deprived plaintiff in error of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

5. In deciding as it did that the plaintiff in error had no further right to operate street railways in the streets mentioned in the decree and in ordering its eviction, the Supreme Court of the State of Michigan decided an issue that was theretofore and then involved and raised in a suit pending in the Circuit Court of the United States for the Eastern District of Michigan, In Equity, wherein the Guaranty Trust Company is complainant and the parties to this suit are defendants. (The proceedings in said suit are set forth and found in the record in this cause.) In undertaking to decide and in deciding said issue, said Supreme Court of the State of Michigan deprived plaintiff in error of its right under the Constitution and laws of the United States to have that issue determined in the Federal Court in which it was pending.

6. In deciding as it did that the plaintiff in error should remove its tracks and other property from the streets within a period of ninety days after notice of a resolution passed by the Common Council, the Supreme Court of Michigan decided an issue not raised by the pleadings and upon which plaintiff in error had no opportunity of being heard and was not heard and with reference to which no trial was had according to the regular and customary form (otherwise than by ex-parte affidavits, which were not credited by the Court), and therefore deprived plaintiff in error of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

7. In deciding as it did that after plaintiff in error has removed its property from the streets it shall restore the pavement in fit condition for public travel, the Supreme Court of Michigan decided an issue not raised by the pleadings nor involved in this suit and upon which plaintiff in error had no legal opportunity to be heard, and therefore deprived it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

8. In deciding as it did that plaintiff in error must—in compliance with a resolution passed by the Common Council of the City of Detroit—remove its street railway property from the streets wherein it now is, and in the limited time specified in its judgment, the property of said plaintiff in error is taken for the use of the public without just compensation and it is deprived of its property without due process of law, in contravention of the terms of the Fourteenth Amendment and the Fifth Amendment of the Constitution of the United States.

9. The Supreme Court of the State of Michigan erred in entering a decree which gives to the hereinbefore described resolutions of the Common Council of the City of Detroit the effect of impairing the obligation of the contract of the plaintiff in error with said City of Detroit, contrary to Section 10, Article I of the Constitution of the United States.

10. The Supreme Court of the State of Michigan erred in entering a decree which gives to the hereinbefore described resolutions of the Common Council of the City of Detroit the effect of depriving plaintiff in error of its property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

11. Until the Common Council of the City of Detroit had itself, by appropriate resolution, determined that plaintiff in error should cease street car operations upon the streets in question and remove its property therefrom, the Court had no lawful authority to determine, as it did, when the rights of plaintiff in error to carry on said street car operations expired and under what circumstances it might be evicted therefrom, and therefore its decision making said determination was erroneous and deprived plaintiff in error of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

12. As the street railway in question constitutes a part of a railway owned and operated by plaintiff in error, extending many miles on each side thereof into adjoining counties and states, and as plaintiff in error under its franchise has the right to maintain and operate said line of railway intact, said decision of the Supreme Court of the State of Michigan gives to the resolution heretofore referred to the effect of preventing said plaintiff in error from the lawful exercise of the franchise herein referred to and therefore erroneously impairs the obligation of the contract of the plaintiff in error contained in said franchises, in violation of Section 10, Article I of the Constitution of the United States, and deprives it of its property without due process of law and denies it the equal protection of the laws, in contravention of the Fourteenth Amendment of the Constitution of the United States.

13. The Supreme Court of Michigan erred in deciding that by reason of the refusal of said plaintiff in error to comply with the terms of the resolution of the Common Council of the City of Detroit (of which "T", "S" and "Q" set forth in the bill of complaint are copies) the plain-

tiff in error is without any rights in or to the streets described in said decree and it has been and is a trespasser in continuing to occupy them and operate cars thereon. In making this decision said Supreme Court gave to said resolutions—which resolutions have the force of law—an effect which impairs the obligation of the contract of plaintiff in error contained in the grant under which said street railways were constructed, and of the contract contained in the ordinance Exhibit "H" attached to the answer of plaintiff in error in this case (which contracts were in assignments of error 2 and 3 particularly described), contrary to Section 10, Article I of the Constitution of the United States, and deprives plaintiff in error of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

14. In deciding that plaintiff in error was a trespasser by reason of its refusal to comply with resolutions "T", "S" and "Q" attached to the bill of complaint, and in ordering said plaintiff in error to cease street car operations and to remove its railway from the streets in compliance with a resolution to be hereafter passed by the Common Council of the City of Detroit, said Supreme Court of the State of Michigan gave to said resolutions the effect of impairing the obligation of the contract of plaintiff in error contained in the grant under which said railway was constructed and the contract contained in the grant Exhibit "H" (said contracts have heretofore been specifically described—see assignments 2 and 3), contrary to Section 10, Article I of the Constitution of the United States, and deprived it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

15. Prior to the decision of the Supreme Court of Michigan, sought to be reviewed, it was settled law in the State (1) that the State franchise granted to a railroad corporation to construct, maintain and operate a railroad becomes attached to and a par of the physical property and is as permanent and perpetual as that property; and (2) that the terms and conditions of the local contract are not a part of the State franchise, and quo warranto will not lie for a violation thereof.

As the local "consent" as distinguished from the terms and conditions of the "local contract" necessarily adheres to and becomes a part of the State franchises to maintain and operate, making it complete and effective, and an individual State franchise, it follows that this State franchise

(including the local consent) is property within the meaning of the due process of law clause of the Fourteenth Amendment, and the owner of that property cannot be deprived of it by a decision of a State court, any more than by a legislative enactment.

The decision of the State Court in this case is more than a mere erroneous decision; it is a deprivation of property without due process of law. Whether it is or not, is certainly a Federal question arising under the Constitution of the Uniied States.

16. By the act of June 8, 1905, annexing to the City of Detroit certain territory formerly a part of the Township of Springwells, in which annexed territory plaintiff in error owned and operated a part of the Fort Street Line—operated in connection with that portion of said line in dispute in this case—said City of Detroit became bound by all the obligations imposed on said Township of Springwells by the agreements Exhibits "E" and "F" (Rec., Vol. 1, pp. 58-62) with the Fort Wayne & Elmwood Railway Company (to whose rights plaintiff in error succeeded) and under which a portion of said Fort Street Line was constructed. By the terms of said agreements above named, plaintiff in error had the right for thirty years from December 14, 1891, to carry passengers over its entire route in said City of Detroit and said Townsihp of Springwells. In its decision in this case said Supreme Court of the State of Michigan gave to resolutions "T", "S" and "Q" attached to the bill of complaint, and to the resolution to be hereafter passed by the Common Council of the City of Detroit, the effect of impairing the obligation of the contract of plaintiff in error above described, contrary to Section 10, Article I of the Constitution of the United States, and deprived it of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

17. Prior to the decision of the Supreme Court of the State of Michigan sought to be reviewed, it was settled law in this State that a company or person engaged in the public business of transporting passengers for hire could not be lawfully evicted from a portion of its railway. The principle established by this law was rule of property and a property right belonging to plaintiff in error, and when the Supreme Court of the State of Michigan changed the law, as it did by its decision in this case, it deprived plaintiff in error of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

18. Prior to the decision of the Supreme Court of the State of Michigan sought to be reviewed, it was settled law in this State that a company or person engaged in the public busines of transporting passengers for hire could not be lawfully evicted from a portion of its railway. The principle established by this law was rule of property and a property right belonging to plaintiff in error, of which plaintiff in error is deprived without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States, by reason of the effect which the Supreme Court of the State of Michigan gives to the resolutions "T," "S" and "Q" attaced to the bill of complaint, and to the resolution to be hereafter passed by the Comon Council of the City of Detroit.

19. By reason of the annexation to the City of Detroit by Act approved June 8, 1905, of the territory in which the predecessor in title of plaintiff in error constructed the street railway by authority of the Township Board of Springwells, contained in resolutions Exhibits "E" and "F" (Rec., Vol. 1, pp. 58-62) and by reason of the agreement Exhibit "H" (Rec., Vol. 1), a contract was made between said City of Detroit and plaintiff in error whereby plaintiff in error had the right for thirty years from December 14, 1891, to carry passengers over its entire route in said City of Detroit. In its decision in this case said Supreme Court of the State of Michigan gave to resolutions "T", "S" and "Q", attached to the bill of complaint, and to the resolution to be hereafter passed by the Common Council of the City of Detroit the effect of impairing the obligation of the contract of plaintiff in error above described, contrary to Section 10, Article I of the Consitnation of the United States, and deprived it of its property without due process of law, in contravention of the Fourtenth Amendment of the Constitution of the United States.

WHEREFORE, said plaintiff in error prays that the judgment, decree and decision of the said Supreme Court of the State of Michigan may be reversed, and that said Supreme Court may be directed to enter an order reversing the decree of the Circuit Court for the County of Wayne, In Chancery, in said cause, or that this Court will enter the appropriate judgment therein.

WILLIAM L. CARPENTER,
JOHN C. DONNELLY,
Counsel for Plaintiff in Error.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

DETROIT UNITED RAILWAY,
Plaintiff in Error,
vs.
CITY OF DETROIT,
Defendant in Error.

No. 1047.

Additional Brief for Plaintiff in Error on Motion to Dismiss, or Affirm or Advance.

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DETROIT:
CONWAY BRIEF CO., 142-150 LAFAYETTE BOULEVARD
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Additional Brief for Plaintiff in Error
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This brief is not intended to be a full discussion of the questions suggested as arising upon the record. Much more can be said in their support when the case is heard upon its merits. It is intended hereby simply to call the attention of the court to the nature of the questions raised, and to point out that they are clearly within Section 10 of article 1, and the Fourteenth amendment of the Constitution of the United States, and that therefore this court has jurisdiction.

I.

1. As to the claim of the plaintiff in error that a federal question arises under Section 10, Article I of the Constitution of the United States, by reason of an impairment of an existing contract obligation by legislative action. As we understand it, it is the settled law that to come within this constitutional provision there must be:

(a) A contract, the obligation of which, it is said, has been impaired.

(b) Some attempted legislative Act by the State or some municipality standing in the same legal relation as the State, the effect of which is to impair the obligation of such contract.

(c) That if a municipality, such as the City of Detroit, created by the authority of the State, seeks through its legislative body to impose conditions or to legislate in contravention of the rights created and granted by the contract, that it is deemed to be State legislation, the enactment of which is a law, within the meaning of this constitutional provision.

2. Going a step farther, we find it to be the settled law of this court:

(a) That the invalidity of a State or municipal enactment, by reason of its violation of this provision, does not defeat the jurisdiction of the court. On the contrary, the Federal Court takes original jurisdiction, if the action is instituted in the first place in the Federal Court to pass upon the constitutionality of the legislation, and thus afford, by the exercise of its jurisdiction, due protection to the injured party. This is also true as to this court in the exercise of its appellate jurisdiction.

(b) If the question arises in a case brought into this court by writ of error for review of a decision of the highest court of the State, the appellate and supervisory jurisdiction of this court will not be defeated and the right of review will not be denied because the State court has held that there was no contract in existence that was or could be impaired by the objectionable legislation. On the contrary, it is the established rule that this court will examine the record and determine, according to its own view of the situation, whether or not a contract exists, the obligations of which would be impaired by the legislation objected to, and this court is not bound to follow the judgment of the State Court in that regard.

It is therefore no answer to the claim of the plaintiff in error simply to say that the State court held that there was no contract in existence and that therefore there is no federal question involved. To hold otherwise would put it within the power of the State Supreme Court, by a misinterpretation of the contract rights of the plaintiff in error to prevent it from exercising its constitutional right to have its case reviewed on the federal question in this court.

A motion to dismiss would not be granted, therefore, where to grant such a motion would require the court to inquire into, determine and pass upon the merits of the controversy between the railway company and the city. At this place we are not considering or having reference to that part of the motion that asks for an affirmation upon the ground that there is no substantial federal question in the case, or that the questions involved have been heretofore passed upon and that there is no distinction between this case and others which have been before this court and determined by it.

3. We are brought, therefore, to a consideration of the two fundamental requirements, namely: A contract which, it is claimed, is impaired; and legislative action which, it is claimed, has the effect of impairing the obligation of the contract. We will consider, first, the claim of contract made by plaintiff in error.

II.

What is the claim of contract made?
Stated briefly, it arises as follows:

Prior to 1891 the predecessor in title of plaintiff in error had constructed and put in operation and was engaged in operating a line of railway from the Westerly city limits of Detroit in a direct line across the city to the Easterly city limits. The terms of construction, maintenance and operation were fixed by three several agreements, two of which were between the city and the company, and one a Township of Springwells grant contract over territory which was subsequently annexed to the City of Detroit. (This, however, is not the territory annexed to the city in 1905, nor is the grant above named the grant to which the company will ask the attention of the court in discussing the question of the present existence of a contract.)

One city contract was made June 30th, 1880, and covered the line, all of which had then been theretofore constructed, between the then Westerly and Easterly City limits. The city claims this contract expired June 30th, 1910.

The other city contract was entered into after the city limits had been extended Westerly to a street known as Artillery Avenue, so that the Westerly boundary intersected Fort Street at Artillery Avenue. This grant contract was dated July 24th, 1886, and it is the claim of the city that it expired by limitation July 24th, 1910. The Westerly city limits remained as established at Artillery Avenue prior to 1886 down to 1905.

All the territory lying West of Artillery Avenue, constituted the Township of Springwells, and all of the existing grants in such territory were created by contracts between the Township and the Railway Company. The first of these township grants was made August 5th, 1889, and provided for the construction of a portion of the line out in the then township, but expressly providing that it should be deemed simply an extension of the city line and that for the purposes of fare the city line and the township line should be deemed to be one route, for both of which but a single rate of fare could be charged. It is conceded that this grant has not expired, but has several years yet to run.

The next township grant is that of December 14th, 1891, by which the further extension of the lines in the township was provided for. This contract also required the extensions to be simply a part of the railway theretofore constructed in the city as extended into the township under the grant last described of August 5th, 1889; that it should all be deemed one route over which, in the city as well as in the township, but one rate of fare could be charged. The language of this provision is:

> "The terms of this agreement shall be for thirty years from the date thereof and the terms of all previous agreements between the Township Board of said township and said company shall be and hereby are extended to thirty years from the date of this agreement. For the purpose of collecting fare, the above line track shall be deemed a continuation of the track heretofore laid and now in operation in said township and the City of Detroit, and each passenger traveling over said entire route continuously either way or any part thereof shall pay one fare, the amount of which shall not exceed five cents."

These city and township grants to the company were made in the exercise of authority conferred by Section 13 of the Michigan Street Railway Act which, at those dates was as follows:

> "Sec. 13. Any street railway corporation organized under the provisions of this act may, with the consent of the corporate authorities of any city or village, given in and by an ordinance or ordinances duly enacted for that purpose, and under such rules, regulations and conditions as in and by such ordinance or ordinances shall be prescribed, construct, use, maintain and own a street railway for the transportation of passengers, in and upon the lines of such streets and ways, in said city or village, as shall be designated and granted from time to time for that purpose, in the ordinance or ordinances granting such consent; but no such railway company shall construct any railway in the streets of any city or village until the company shall have accepted in writing the terms and conditions upon which they are permitted to use said streets; and any such company may extend, construct, use and maintain their road, in and along the streets or highways of any township, adjacent to said city or village, upon such terms and conditions as may be agreed upon by the company and the township board of the township, which agreement and the acceptance by the company of the terms thereof, shall be recorded by the township clerk, in the records of his township."

The other provisions of the section were added at a much later period. It should be noted that the law contemplates that the road in the city and township shall be deemed to be one railway, and this provision of the statute gives a reasonable intent and meaning to the provision of the township contracts declaring that the city and township lines should be deemed to be one route, and providing for the imposition of but one rate of fare to ride over the entire line in both city and township, and for the operation of through cars and lends force to the claim of plaintiff in error as to effect of the ordinance of 1906.

The railways authorized under the foregoing several city and township grants were constructed and put in operation according to the terms thereof and have con-

tinued to be operated as one line, up to the present time. It is the claim of the city that all rights granted under the city contracts would expire not later than the 24th day of July, 1910, but on the other hand that rights given by the township will not expire until 1921, is expressly acknowledged and affirmed by legislative action of the Common Council of the City of Detroit in adopting the ordinance of 1906.

This brings us, naturally, to a statement of the facts found in the record, from which plaintiff in error claims that it clearly appears that the City of Detroit recognized and approved of the terms of the township grant, and extended the application of the same to the entire system, including the portions constructed and operated originally under the city grants. The attention of the court is invited, therefore, to the following facts appearing in the record.

In 1889 the city and company agreed to certain extensions and reconstructions of double tracking over the system of railway. In part consideration for the extensions and other privileges granted by the contract of 1889 the company agreed that between five-thirty and seven o'clock a. m. and five-fifteen and six-fifteen p. m. passengers should be entitled to ride over the entire route at a reduced rate of fare, namely, eight tickets for twenty-five cents, each ticket good for one ride. By express agreement this reduced rate of fare was limited to lines constructed under the city grants. The township grants provided for and authorized the collection of a straight five-cent fare during all hours of the day, and provided that any party desiring to ride over the route, a part of which ride was within the city and a part of which was in the township, had to pay and did pay a straight five-cent fare at all hours of the day.

In 1905 the Legislature of Michigan annexed all of that portion of the territory in the Township of Springwells within which the railways constructed under the township grants were situated, to the City of Detroit, so that from the date the Annexation Act went into effect the entire system became subject to the jurisdiction of the City of Detroit and its legislative body.

Shortly after the annexation the city demanded that the company put in force over the whole route a reduced

rate of fare of eight tickets for twenty-five cents. The Company claimed that it had a contract with the township until 1921, by which it was authorized to charge a full rate of five cents for a ride over the entire system if the ride either commenced or terminated within the limit of the township grant.

This controversy was settled by the city adopting an ordinance amending the township grant by which the city super-added a requirement that the company carry passengers during certain hours at the reduced rate, and that such reduced rate should be in force over the entire system, including lines constructed under the city grants for the full period of the township grant that is until 1921, and that all the other provisions of the township grants should remain unchanged. Among these provisions was one entitling a passenger to ride for a single fare of five cents from any point within the township to any point in the city and vice versa. This right of course would continue for the full term of the township grant, and was one of the things which the city agreed should remain unchanged. While it may be conceded that the township and the company could not by the agreements of 1889 and 1891 and without the consent of the city provide for the maintenance of the tracks constructed under the city grants, for the full term of the township grants yet it is clear those township contracts did contemplate that the city tracks would remain in use for that full period. It cannot be questioned that the city could consent to such continued maintainance and use, and it is the claim of the company that by providing in the amendatory ordinance that all the other terms of the township agreement should remain it thereby expressly rectified and accepted the fare clause in the township contract and became bound thereby for the full term of the township grant. This subjected the city lines to the performance of the obligation imposed by the township agreements.

The ordinance is Exhibit H (Rec. vol. 1, p. 67). It recites among other things that the plaintiff in error, owns and operates lines which were constructed and were then maintained and operated under the township grants which provided for a five-cent rate of fare, "each fare to be good for a continuous ride from any point in said township to any point in Detroit on the Fort Wayne and Elmwood Railway Line, so called,"

and that by the act of Annexation, June 8th, 1905, all the said lines of railway were brought wholly within the city limits; that the city claimed that the reduced rate of fare—eight tickets for twenty-five cents, during certain hours, should be put in force over the entire system, whether constructed under the township grants or the city grants; that the company and the city agree that the township grants may be modified as thereinafter set forth, but that the other terms and conditions of the township grants should remain unchanged.

Section 1 of the ordinance (which is the only section), then provides as follows:

> "The Detroit United Railway shall, for the full term of said township grants, issue and sell tickets at the rate of eight tickets for twenty-five cents, each of said tickets to be good for a continuous ride between any two points of what are known as the routes of the Fort Wayne and Elmwood Railway Lines, so called, whether constructed under grants from the township of Springwells or from the City of Detroit, between the hours of five a. m. and six-thirty a. m., and the hours of four forty-five and five forty-five p. m., but the terms of said township grants in all other respects shall not be modified nor changed, nor shall this ordinance and the acceptance thereof be construed to abridge, enlarge or extend any rights acquired by said railway company or its assignors or predecessors in title under said several grants from the Township of Springwells."

As above stated, the company at once accepted this agreement and from thenceforth operated under it.

By referring back to the township grants then in force, namely, Exhibits E and F. (Rec. vol. 1, pp. 56-62), it will be seen that among the important provisions and terms in the township grants which should not modified or changed were the folowing:

(a) The agreement of August 5th, 1889, was to continue for thirty years from that date, and all other prior township grants were to run concurrently with it.

(b) That the road in the township and the road in the city extending from the westerly terminus of the town-

ship grant to the easterly terminus in the city should be deemed one route, over which but a single rate of fare could be charged.

The contract of December 14th, 1891 (Exhibit, F), contained the following terms and conditions:

(a) The agreement should continue in force for thirty years from the date thereof, and all prior agreements, were extended and continued in force concurrently with this agreement.

(b) The above described lines of track "shall be deemed a continuation of the track heretofore laid and now in operation within said township and the City of Detroit, and each passenger travelling over said entire route continuously either way, or any part thereof, shall pay one fare, the amount of which shall not exceed five cents."

(c) After the annexation of the portion of said township within which said tracks lie to the City of Detroit, said company shall comply with the ordinance of the city relative to running cars. This provision is a part of that portion of the township contract which arranges the minimum schedule for the operation of cars in the township.

The further important fact must also be borne in mind that when the ordinance of 1906 was adopted the entire railroad was in operation.

The track construction was permanent in character, so that when the agreement of 1906 was made, there is no reason to believe that the existing track in use, constructed under the city grants, and which continued to be in use down to 1910 and since then, was not necessary for the performance of the obligation fixed by the agreement of 1906 to carry passengers at the rate of eight tickets for a quarter over the city lines for the full period of the township grant.

It was undoubtedly the intention of both the city and company that it would not be necessary to construct or to get the consent of the city to the construction of new and different tracks and we are justified in claiming that the contract of 1906 was made expressly with reference to the continued maintenance and use of the existing tracks and the extension of the township contract, in its modified and amended form, to the tracks then in existence which had been constructed under the city grants, and to be in force thereon until December, 1921.

III.

As a corollary to the foregoing we submit that a good faith claim of contract is a good faith claim of a property right under the Fourteenth Amendment. We do not care to add much to what is said in the other brief on this point. That the right to maintain the street railway in the street is *property* cannot be questioned, and that the combined action of the state court and the city heretofore had, to be followed by further exercise of power by the city authorities, ending without remedy *that right to use the streets* is state action is stated in the other brief at sufficient length to render unnecessary further discussion thereof. But in addition to assuming that the contracts (express or implied) and property right specifically claimed by the railway company is there not certain other property rights of great value created by the very condition of things of which the company is wrongfully deprived in violation of the Fourteenth Amendment?

Here is a railway company chartered by the state, with the necessary and appropriate franchises to own, construct, maintain and operate a street railway in Detroit and surrounding country. Here is a railway the ownership and use of which is authorized by the state. It is engaged in operating the same and thus meeting its obligation to the public and state. This railway as a unit constitutes one continuous route, both conditions having the approval and consent of the city. On some parts the so-called consent of the city to occupy the street as right-of-way it is claimed have expired. On other parts this right-of-way is not attacked. By tearing up the track on which it is claimed the right-of-way no longer continues, the undisturbed portions of the railway are rendered practically valueless and through traffic destroyed, while that torn up is destroyed. Bear in mind that the city has affirmatively by ordinance recognized and approved the whole railway as a unit and one route. It has been held in Michigan that these street grants create an interest in lands in the nature of an incorporeal hereditament, thus adopting the definition adopted in several states, and further declaring these grants to be grants of "rights of way."

Detroit Citizens St. Ry. Co. vs. Detroit, 124 Mich., 453, citing cases from many states.
Detroit Citizens Street Railway vs. Detroit (Ct. of App.), 64 Fed. R., 643.

This last case sees no difference between a grant of right of way on a street and one from an owner of private land. It is cited as the basis of the decision in

Knoxville vs. Africa, 23 C. C. A., 252, (77 Fed., 501),

which in turn is cited with approval by the Michigan Supreme Court in 124 Mich. above cited.

It is therefore the settled law of Michigan that the grant of the right to occupy a street by the railway is the grant of an easement which constitutes a right of way and is an interest in lands, and in its legal characteristics is not in any sense different from the grant of a right of way over private lands by the owner thereof.

It is also claimed by counsel for plaintiff in error that by express ruling, the Supreme Court of Michigan adopted the principle of the rule laid down by this court, that a railway, whether it be a general railroad or a street railway, being a public highway created by authority of the State, its operation as a unit and a through line, for public use and in the public use and interest, can not be interrupted or a portion of its track torn up and removed because its title to a part of the right of way has terminated by reason of limitations therein or lapse of time, but that some remedy other than that of the destruction of the railroad must be sought for and applied for the protection of the interests of the party controlling the property upon which the right of way has expired.

A striking example of the application of this rule is Austin vs. Rutland Railroad Company, 45 Vt., 239, where the railroad entered into possession of the right of way under a grant from a life tenant, and in which, upon the death of the life tenant, the owner of the fee, who had never consented, sought to oust the railroad. This doctrine met with the distinct approval of this court in New York vs. Pine, 158 U. S., 100, in which the learned Justice quotes at length from Charleston Railway Company vs. Hughes, 105th Georgia, 1.

Keeping in view the declaration of the Michigan court that the street grants are easements and grants of rights of way and are interest in lands and partake of the same character whether granted by the municipality for the use of the street or by a private individual across his land, we can see no distinction between the cases above cited and the case at bar. The Fort street line or route was built under several grants or easements, and rights of way, but all having in view the creation of the line as one route, one railway, and a distinct legislative recognition by the City of Detroit of the railway as one line and one route.

It is proposed that because, as claimed, the period for which a portion of that right of way was granted has expired, the city, who was the original grantor thereof, has a right to require the breaking-up and disruption of the system, thereby disturbing the public use and interest therein, and thereby utterly destroying the piece of track which it is proposed to tear up, and the value of the system.

We desire an opportunity to argue this question to this court, and we claim, in good faith, that it presents a federal question, because the decision of the State Supreme Court, which is State action, and the city in enforcing the resolutions, is a complete reversal of the legal policy, judicially declared, of the State with reference to property of this character, thereby giving force and effect of law to the resolutions of the Common Council of the City of Detroit theretofore passed and set forth in the record and to be hereafter passed, terminating the rights of occupancy on the street and requiring the tearing up and removal of the tracks and equipment of the plaintiff in error, the breaking up of the line and system and the permanent injury to the remainder of the line; that the law, as previously understood and settled, was a rule of property and that the judgment of the Supreme Court of the State giving the resolutions above referred to the force and effect of a law depriving the plaintiff in error of the protection and benefit of said rule of property, all of which is in violation of the Fourteenth Amendment of the Federal Constitution. What we have said with reference thereto is simply for the purpose of calling the attention of the court to the fact that the question is in the case under the Twelfth Assignment of Error and

that we should be given an opportunity to argue it and it is one which we think we are entitled to have this court pass upon.

IV.

In Michigan street railway corporations are organized under general laws, which in addition to conferring on the stockholders of any such corporation the franchise of corporate existence, confers on the corporation itself, the franchise *"to construct and operate railways in and through the streets of any town or city in this state,"* as it is expressed in one act, and *"of constructing, owning, maintaining or using any street railway in any city, village or township in this state"* as it is expressed in the other act. *2 Mich. Comp. Laws, 1897, secs. 6424, 6435.*

The only limitation put upon this state franchise is, that it cannot become complete and operative as to any street or part of a street in any city, village or township *"without the consent of the municipal authorities."*

No time limit is put on the state franchise or on the local consent.

The local authorities and the street railway corporation are authorized to agree on regulations, terms and conditions, including rates of fare, and these agreements as between the immediate parties to them are binding and inviolable contracts.

Prior to the adoption of a new state constitution in 1908, no time limit was placed on the duration of these local contracts; but it was held that there was an implied power, to agree upon a limitation in point of time.

The local contracts acquired by the Detroit United Railway were limited to certain specific periods, and one of the serious questions presented by the record in this case, is whether the termination of the local contract, also terminates and destroys the state franchise and the local consent, and necessitates the destruction of the physical property constituting the street railway, by its removal from the streets, at the demand of the municipal authorities?

The three elements to be considered are:

1. The physical property, and the right to maintain and operate it, conferred by the state franchise, and without which the property is of little value.

2. The local consent which makes the state franchise complete and operative.

3. The local contract fixing the terms and conditions.

And the question is, whether the "local consent" adheres to and becomes a part of the state franchise and of the physical property, or does it go with the "local contract," and cease to exist when that contract expires by its own limitation.

It is obvious that the naked issue here presented is brimful of Federal questions arising under the constitution of the United States; and as they were seasonably raised and specifically stated in the pleadings and at the hearing in the trial court, and were insisted upon in the Supreme Court of the state and ruled adversely to the company, there are no possible grounds for dismissing the writ of error for want of jurisdiction.

We are not disposed on the occasion of this motion to make an elaborate argument or to cite authorities, but beg leave to say that the plaintiff in error, relies on the recent case of *Louisville vs. Cumberland Telephone and Telegraph Company,* 224 U. S. 649, 661, 663-4, which is recognized and followed in the still more recent cases of *Grand Trunk Western Railway Co vs. South Bend,* and *Southern Pacific Co. vs. Portland,* both decided *Feb. 24, 1913.*

We call attention to the following parts of the transcript of the record:

I. The answer and cross-bill of the Detroit United Railway distinctly invoked the protection of the constitution of the United States, and asserted that it was possessed of a propery right to continue the operation of its street railways after the expiration of the local contracts, and "that it has irrespective of any contracts with or grants from the city of Detroit an exising right to continue to maintain and operate the said lines of street railway in said city and to carry passengers for toll thereon." *Record vol. 1, p. 46, paragraph (b).*

The right to protection under the constitution of the United States is specificially set up and claimed as follows:

> "That the said several resolutions with reference to said lines of railway by reason of the recitals therein contained as to the rights of this defendant in the streets, and as to its right to maintain and operate the said Fort street lines of railway as herein set forth together with the attempted exaction of the Two Hundred ($200.00) dollars per day as therein set forth—
>
> (a) Constitute a cloud upon the title of your orator (defendant) in the premises and its right to use said streets and use and occupy its lines of railway.
>
> (b) Said resolution is in violation of the 14th Amendment to the Federal constitution in that it attempts to and if enforced would deprive this defendant of its property without due process of law, and further denies it the equal protecion of the law. And it is further in violation of section 10, Article I of the Constitution of the United States in that it impairs the obligation of the contract between the state of Michigan and this defendant as the successor in title and the present owner of said Fort street lines, and also the obligation of the contracts between said City of Detroit and this defendant as such successor in title and present owner of said lines." (Record Vol. 1, p. 46.)

II. At the close of the hearing in the Circuit Court for the County of Wayne, in Chancery, the counsel for the Detroit United Railway made the following motion to dismiss (*Record, vol. II, pp. 91-92*):

> "Counsel for the Detroit United Railway moves the court to dismiss the bill of complaint of the City of Detroit, and to grant the cross-relief prayed by the Detroit United Railway, and for the following, in addition to all the other reasons urged on the argument:
>
> "1. The grants and contracts under which the street railways known as the Fort street lines were built and operated were made under the Constitution of 1850 and the Tram Railway Act of 1855,

and under the express and implied provisions of said grants and contracts, the state franchise to maintain and operate street railways upon the streets named and designated became attached to and a part of the physical property, and whoever owns the physical property, is entitled to exercise the state franchise to maintain and operate, regardless of the question whether there is any further local consent or agreement; such owner of the physical property being obligated in the absence of an agreement fixing rates of fare, to charge reasonable fares only.

"2. On the other hand the local consent and the physical property have become attached to and a part of the state franchise; all of these three elements taken together, constituting an indivisible franchise and property, the legal existence of which can only be questioned by the State of Michigan, and then only on a forfeiture for cause.

"3. The Detroit United Railway having the right, after the expiration of the local grants, to continue to maintain and operate the Fort street lines, the resolutions of the Common Council imposing upon the company an unreasonable and confiscatory rental or license fee of $200 a day, is in violation of Section 10, Art. 1, of the Constitution of the United States, and in conflict with the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

"4. Assuming that the City of Detroit had a right at the expiration of the local grants to dispossess the street railway company, yet, it has no power to exact an unreasonable and confiscatory rental or license fee for the further occupation of the streets, and if the laws of Michigan are construed to authorize any such action on the part of the city, they are in conflict with the provisions of the Federal Constitution referred to above.

"5. Under the laws of Michigan there is ample authority in the courts, and in the Michigan Railroad Commission subject to review in the courts, to determine whether the rates of fare, or any other of the terms and conditions, demanded by the city or charged and insisted upon by the company are reasonable or not, and to deny such an inquiry

to the Detroit United Railway, would be a denial by the State of that equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States."

III. The opinion of the learned judges of the Wayne Circuit Court expressly passed on the question whether the Detroit United Railway had any right to remain in the streets, and held and entered a decree, that the company had no such right, and must remove its property from the streets at the demand of the city. *Record, vol. II, pp. 115, 116.*

And the supreme court of the state affirmed this ruling and entered a like decree, thereby necessarily passing upon the Federal questions arising under the constitution of the United States, so carefully and specifically raised and stated by the counsel for the company.

Where the local contract fixing rates of fare expires, and the parties, from the perverseness of the one or the other, are not able to come to a new agreement, there is ample power in the State Legislature by its own action or by conferring authority on the State Railroad Commission or even on the Common Council of the City of Detroit itself, to fix reasonable fares, with the certainty that any reasonable action thus taken will not be disturbed by this court, as in *Louisville vs. Cumberland Telephone and Telegraph Company, 225 U. S. 430.*

At all events that is the way pointed out by this court to preserve the rights of the public without destroying the rights of private property.

Again: If the City of Detroit desires to own and operate the street railways now the property of the Detroit United Raiwlay, and can show a public necessity therefor, it can secure title to the property by condemning it to the public use. *Cincinnati vs. Louisville and Nashville R. R. Co., 223 U. S. 390.*

V.

The decree of the Supreme Court of Michigan that the Detroit United Railway must stop the operation of street cars on its Fort street lines, within ten days after notice from the Common Council of the City of Detroit so to do, and to remove its tracks, poles and wires from the streets within ninety days is not within the issues presented by the pleadings and is beyond the objects and purposes of the suit; and it is in and of itself a violation of the due process of law clause of the Fourteenth Amendment of the Constitution of the United States.

The Common Council of the City of Detroit never has passed a resolution demanding or requesting the Detroit United Railway to stop operation and to remove its property from the streets, and the decree of the Supreme Court of the state expressly provides that such a resolution must be passed, and the time limits designated by the decree, must expire, before a writ of assistance may be issued to dispossess the company.

The object of the suit was to collect the accrued per diem of $200 and a decree of dispossession was only sought as a means of compelling the payment of the money judgment the city desired to recover.

The second paragraph of the prayer for relief expressly prayed for a money decree, and the fourth paragraph prayed for a decree that the Detroit United Railway "shall forthwith pay to your orator the sums therein stipulated and all accumulation thereof, and if it shall fail to do so, *then* that said Detroit United Railway be perpetually restrained and enjoined from running or operating street cars upon said streets, and that said Detroit United Railway forthwith from the entry of the decree herein elect to either pay the money due and to become due, mentioned in said resolutions, to the City of Detroit, and abide by and be bound by all the terms and conditions imposed in said resolutions, or cease forever thereafter running or operating cars upon said streets and remove its said tracks and railway equipment from out and off said streets and highways."

The fifth paragraph prayed for a temporary injunction from operating cars, "unless it (the company) forthwith

pay your orator the money mentioned in said resolutions." (the per diem of $200.) *Record Vol. 1. pp. 11, 12, 13.*

The Supreme Court of the state seems to have realized the impropriety of granting a decree of dispossession, before the city had made any demand for possession, and that the record did not disclose any such demand; but the court undertook to cure this defect in the complainant's case, by providing for a demand for possession in the future, at such time as the common council might see fit to pass and serve a resolution directing the defendant to stop operation and remove from the streets. As to the legal effects of this on the contract rights of Plaintiff in Error we refer to brief of Messrs Carpenter and Donnelly.

In *East Tenn. Telephone Co. v. Board of Councilmen of the City of Frankfort, 190 Fed. 346, these facts appeared.*

April 11, 1881 the City Council granted permission to the telephone company to erect a telephone system in the city. May 23, 1910 the city claiming that the permission granted by it in 1881 was a mere license and not a franchise, passed an ordinance that no telephone company should be allowed to do business in the city without a franchise, and then commenced prosecutions to enforce the penalties imposed by the ordinance.

The telephone company filed a bill in the state court to enjoin the city from enforcing the ordinance, claiming that the permission granted in 1881 was not recovable by the city, but conferred perpetual rights. The court dismissed the bill, but on appeal to the Kentucky Court of Appeals, the decree was reversed (*141 Ky. 588*) on the ground that although the grant was only a license, the city had not exercised its right of revocation.

The opinion of the court concludes as follows:

"But while the council may revoke its permisison, it can only do so where as here extensive improvements have been made upon the faith of it, upon reasonable notice, giving the grantee a reasonable opportunity to remove his property from the premises or to acquire a new franchise. The council has not as yet revoked the permission and until it is revoked, the grantee is rightfully in possession, and cannot be fined for doing business without buying a franchise or for charging more for its phones than is allowed to the

purchaser of such a franchise. Ninety days is a reasonable notice under the circumstances.

"The council may by ordinance or resolution revoke the permission granted by the resolution of April 11, 1881, making the revocation to take effect in ninety days, and giving the telephone company notice of its action. If the telephone company continues to do business after ninety days notice of the revocation, it then may be proceeded against under the ordinance of May 23, 1910, but it should have ninety days time either to obtain a franchise or to move its property from the streets. (25 Cyc. 650.)"

This decision was rendered Jan. 7, 1911. Thereupon the council passed a resolution giving the company ninety days' notice of revocation. On a motion for a rehearing the Court of Appeals sustained this action of the city (144 Ky. 86).

The telephone company then filed a bill in the Federal Court, and moved the court for a preliminary injunction. Cochrone, District Judge, granted the motion, holding:

1. That the permission granted was not a revokable license citing *Mayor of Morristown vs. East Telephone* Co., *115 Fed. 304, as an authority the court was bound to follow.*

2. That the decision of the state court was not res adjudicata, because the question decided was not within the issue, which only involved the question whether the penal ordinance could be enforced, before the city had revoked the license, and on that question the company had won in the state court:

Citing *Munday vs. Vail,* 34 N. J. L. 418; *Reynolds vs. Stockton,* 140 U. S. 254.

Munday vs. Vail, 34 N. J. L., 418, is a case where a bill was filed to set aside a conveyance of real estate as fraudulent and void as against a judgment held by the plaintiff, but the decree went beyond the relief sought, and declared generally that the conveyance was fraudulent, null and void and of no force whatever in law or in equity.

Another judgment having been rendered against the defendant, the property was levied upon and sold on execution, and the question was whether the purchaser at the execution sale had acquired title.

Held, that notwithstanding the general language of the decree, it was limited to the matters of inquiry presented by the complaint and answer, and therefore was simply an adjudication that the deed was voidable and annulling it so far as it conflicted with the rights of the plaintiff in that suit, leaving it to stand good as a deed *inter partes* and valid as to all other parties.

In *Reynolds vs. Stockton, 140 U. S., 254,* a New York life insurance company transferred its assets and liabilities to a New Jersey life insurance company, which failed, and its assets were taken possession of by the New Jersey Court of Chancery and a receiver appointed by it. An ancillary appointment was made by a New York court. Policy holders in the New York company then commenced a suit in the New York court to reach and distribute a fund of $100,000 deposited by the New York company with the Insurance Department of the State at Albany. The New Jersey corporation and its receiver were made parties defendant, as were the New York corporation and the superintendent of insurance. The scope and object of the suit was to reach and appropriate the fund of $100,000, but in addition to that relief the court entered a judgment against the New Jersey corporation and its receiver for $1,010,496.29. They had appeared in the case and filed an answer, in which accepting the obvious purpose of the complaint, met its allegations with an assertion of the right of the New Jersey company to the fund.

When the judgment was presented to the New Jersey court, it refused to recognize it as an adjudication against the receiver or the assets of the New Jersey company, and the decision of the Court of Chancery was affirmed by the New Jersey Court of Errors and Appeals (43 N. J. Eq. 211).

And it was also affirmed by the Supreme Court of the United States, in an opinion by Mr. Justice Brewer, in which he held that a judgment must be responsive to the issues tendered by the pleadings, and then said:

> "This proposition determines this case, for, as has been shown, the scope and object of the suit in the New York court was the subjection of the fund in the hands of the superintendent of the insurance department of that State to the satisfaction of claims against the New York company.

> The cause of action disclosed in the original complaint was not widened by any amendment; and there was no actual appearance by the receiver Parker or the New Jersey company subsequently to the filing of their answer. No valid judgment could, therefore, be rendered therein, which went beyond the subjection of this fund to those claims."

See also *Standard Oil Co. v. Missouri,* 224 U. S. 270, 281-2.

In the Kentucky case, *190 Fed. 346, 348,* Judge Cochrane disposed of the new constitution of that state with the following comments which are applicable to the new constitution of Michigan.

> "In construing the grant one has to be on his guard against allowing the policy of the state as evidenced by its present Constitution and laws to affect his judgment. It is its policy now that no such privilege shall be given away under any conditions. It shall only be sold to the highest bidder and that for a limited period of time, not exceeding 20 years. When this grant was made, no such policy was in existence. This circumstance has a bearing upon the construction of the grant. It has what has been termed 'a contemporary equation.' It contains 'a standpoint as well as a subject.' In ascertaining its meaning, therefore, one must transport himself to those days and look at it through their eyes. I think that it must be conceded on all hands that these general considerations applicable to a determination of the question are sound."

We respectfully submit the motion to dismiss, affirm or advance should be denied.

JOHN C. DONNELLY,
FRED A. BAKER,
Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 1047.

THE DETROIT UNITED RAILWAY, APPELLANT,

vs.

THE CITY OF DETROIT, APPELLEE.

REPLY BRIEF FOR THE CITY OF DETROIT, APPELLEE, ON MOTION TO DISMISS, AFFIRM OR ADVANCE.

RICHARD L. LAWSON,
ALFRED LUCKING,
Counsel for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

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REPLY BRIEF FOR THE CITY OF DETROIT, APPELLEE, ON MOTION TO DISMISS, AFFIRM OR ADVANCE.

Counsel for the appellant in their principal brief make two points to which we wish to make brief reply.

These two points are:

1. That we did not in our brief discuss all the alleged Federal questions, but only two of them.

2. That we did not discuss the force of the *resolution to be passed* by the common council as preliminary to the writ of assistance for the removal of the tracks.

A word about each of these:

I.

Counsel say our motion to dismiss ought not to be granted because we did not in our main brief discuss all the Federal questions which they claim are raised.

(*a*) We did discuss the two and the only two questions referred to in their petition for the writ.

At great length, they set forth in their petition the alleged Federal questions on which they based their right to writ of error (see the petition printed in appendix to their principal brief, at pages 36 to 42).

They had the burden of showing jurisdiction and they attempted to comply with this by setting forth at length these two alleged Federal questions with the arguments in support thereof. These we attempted to cover in our brief.

We judge these are all they really rely upon, because they are the only ones discussed in their briefs. The principal brief only discusses one of them, but the "additional brief" does also refer to the other. Both of them are fully covered in our original brief.

It is safe to assume that if counsel had any confidence in any of the others referred to in the assignment of errors, but not in any way set forth in their petition for the writ, they would have called the same to the attention of the court in one of their briefs. It is to be inferred that they did not regard them as worthy of discussion or they would have called them to the attention of this court.

(*b*) They say we ought to have discussed a number of others because, tucked away in a corner of their petition for the writ, they use this language:

> "Your petitioner presents herewith its assignments of error raising the foregoing and other Federal questions."

The truth is, we did not notice that reference, but we submit to your honors, that we had a right to rely upon the petition reciting the grounds of jurisdiction in full so long as it undertook to set forth the same and to argue the same, and these we did discuss at length. We again call attention to the fact that they do not discuss any others in either of their briefs. But in the principal brief they call the court's attention in a parenthesis to assignments of error 5, 6, 7, 8, 12, 15, 17 and 18, meaning thereby to have the court understand that there were some other Federal questions involved in those assignments of error not discussed by us. Although the counsel themselves seem to place no particular reliance upon them, since they do not in any way challenge the court's attention to them, nevertheless we will refer to them briefly. They are contained on pages 46-50 of appellant's principal brief.

ASSIGNMENT NUMBER FIVE (page 46, appellant's principal brief) is based upon the statement that a prior suit pending between the same partfes in the United States District Court, at Detroit, involved some of the same questions.

It is sufficient answer to this to say, that the pendency of a suit between the same parties does not give one of them a constitutional right to have that case tried in advance of the other, even if their statement of the issues involved were true, which it is not.

ASSIGNMENT NUMBER SIX (page 46, appellant's principal brief). This is precisely the same question that is discussed in our original brief at pages 9 to 13 and need not be further referred to.

ASSIGNMENT NUMBER SEVEN (page 46, appellant's principal brief). This is based upon that portion of the decree of the Supreme Court of Michigan which permits the rail-

way company to remove its tracks, but requires it to restore the pavement to a condition fit for travel. If at the termination of a street railway franchise the company be permitted to take its property away, it requires no law or reasoning to support the proposition that it must leave the street fit for travel and not in an impassable condition.

ASSIGNMENT NUMBER EIGHT (page 46 of appellant's principal brief). This also is covered by the discussion in our main brief.

ASSIGNMENT NUMBER TWELVE (page 46 of appellant's principal brief). This relates to the proposition that as the defendant operated the tracks in question in connection with other tracks, a decree could not be made interrupting the use of the part where the franchise had expired. This is simply a determination of the general rights of the parties under their contracts and does not involve any question arising out of any subsequent law of the State and therefore involves no Federal question.

ASSIGNMENT NUMBER FIFTEEN (page 48 of appellant's principal brief). This relates to certain claims of some of the counsel for the railway to the effect that its rights were based on certain State grants as well as local consent, which rights continued in practical perpetuity, notwithstanding the expiration of the original contract rights.

These claims were disposed of by the decision covering the examination into the rights of the railway under their original grants, on which the decision of the Supreme Court of Michigan would be final, and out of which no Federal question arises.

ASSIGNMENTS OF ERROR SEVENTEEN AND EIGHTEEN (pages 49 and 50 of appellant's principal brief). Under these assignments claim is made that it was settled law in Michigan, prior to this decision of the Supreme Court of Michigan, that

a railway company could not be evicted from a portion of its railway and that this decision changed that law.

No decisions were cited in the Supreme Court of Michigan to support any such claim and none are cited here. No decision can be found, either in the courts of Michigan or in the courts of any other State of this Union, or the United States, that when the time given by a franchise for operating a street railway has expired, that the railway cannot be compelled to remove. On the contrary, there are any number of decisions the other way.

We have thus briefly referred to each of the alleged Federal questions mentioned in the assignment of errors which it is claimed we failed to refer to in our brief. We submit there is nothing in any of them calling for further discussion. In demonstration of which we again challenge the attention of the court to the point that in their briefs they do not bring them, or any of them, to the attention of the court.

II.

They further say we did not discuss in our original brief the force of the resolution *to be passed* by the common council after the making of the decree of the Supreme Court of Michigan and as preliminary to the removal of the tracks.

The fact is, we thought the claim about this was too fanciful and too whimsical for serious discussion; but here are what we conceive to be two sufficient answers:

(*a*) This resolution when passed by the common council is not to cut off or impair any rights, contract or otherwise, of the railway company.

The court held that the railway company had no right to remain in the street after the expiry dates, but that it would

require the city to give the railway a reasonable time by notice to remove; and, as the city can only act by the resolution of the common council in giving such a notice, it required a resolution.

Hence this resolution, then, is only the expression of the city's desire to insist upon its rights already heretofore established by the decree. It does not impair or cut off any right of the railway. Therefore, when passed, it does not raise any Federal question.

(*b*) *This precise form of decree* was proposed and asked by the railway company and was granted by the Supreme Court of Michigan, *against our objection.*

We asked the court to fix in the decree the time of removal and make it definite and automatic, unless the railway company in the meantime secured permission from the common council to remain longer. But the railway company's counsel asked the court to require the common council to pass another resolution, and the railway company's counsel proposed this identical form of decree which they now try to make the basis of an appeal.

It is needless to say that they could not induce the Supreme Court of Michigan to require the common council to give them an additional notice to quit by resolution and then make that provision of the decree, which was granted as a favor to them and at their request, the basis for an appeal to this court.

They admit in their brief that this clause of the decree was inserted at their request and for their accommodation. (See their principal brief, pages 12, 15.)

In conclusion, we beg to say—

THERE IS NOT A LINE, A WORD OR A SYLLABLE IN THE OPINION OF THE SUPREME COURT OF MICHIGAN, OR IN THE DECREE OF THAT COURT, WHICH TENDS TO GIVE TO ANY RESOLUTION OF THE COMMON COUNCIL, PAST OR FUTURE, THE

EFFECT TO CUT OFF OR IMPAIR ANY RIGHTS OF THE RAILWAY COMPANY. THE COURT SIMPLY HELD THAT ALL THE COMPANY'S RIGHTS HAD EXPIRED IN JUNE AND JULY, 1910. IT HELD THE RESOLUTIONS ALREADY PASSED, REQUIRING A RENTAL, TO BE WITHOUT ANY EFFECT, BECAUSE NOT ACCEPTED BY THE RAILWAY COMPANY; AND AT THE REQUEST OF THE RAILWAY COMPANY, AND AGAINST OUR OBJECTION, IT REQUIRED THE COMMON COUNCIL TO PASS ANOTHER RESOLUTION GIVING THE RAILWAY COMPANY NOTICE TO REMOVE BEFORE ACTUALLY ISSUING A WRIT OF ASSISTANCE. BUT THIS RESOLUTION, WHEN PASSED, WOULD CUT OFF NO SUBSISTING RIGHTS OF THE RAILWAY COMPANY, FOR THE COURT HAD ALREADY DECIDED THAT IT HAD NO RIGHTS TO BE CUT OFF.

Respectfully submitted,

RICHARD I. LAWSON,
ALFRED LUCKING,
Counsel for Appellee.

[21250.]